

**State of Michigan  
In the Supreme Court  
Appeal from the Court of Appeals**

**JOAN M. GLASS**

**Plaintiff-Appellant,**

**v**

**Docket No. 126409**

**RICHARD A. GOECKEL and  
KATHLEEN D. GOECKEL,**

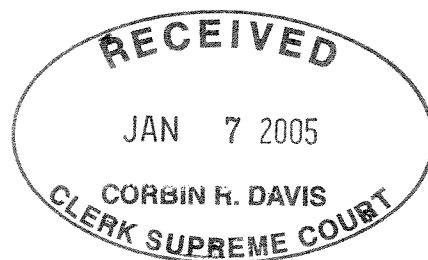
**Defendants-Appellees.**

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**BRIEF ON APPEAL – APPELLANT**

**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF QUESTIONS PRESENTED**

**Issue I: Did the Court of Appeals err in ruling that plaintiff and other members of the public cannot walk the sovereign shores of the Great Lakes without trespassing on private rights, where decisions of the Michigan Supreme Court and United States Supreme Court applying the public trust doctrine to the shores of the Great Lakes have consistently held that the public's rights of navigation and recreation extending up to the ordinary high water mark are inalienable?**

Plaintiff-Appellant answers "yes."

Defendants-Appellees answer "no."

The Court of Appeals answered "no."

The circuit court would obviously answer "yes."

**Issue II: Did the Court of Appeals err by interpreting the Great Lakes Submerged Lands Act, enacted by the Michigan Legislature to preserve and protect the public trust in the beds and shores of the Great Lakes up to the ordinary high water mark, as not embracing the public right to passage by foot over Great Lakes shores?**

Plaintiff-Appellant answers "yes."

Defendants-Appellees answer "no."

The Court of Appeals answered "no."

The circuit court would obviously answer "yes."

**Issue III: At a bare minimum, should the Court of Appeals decision be vacated and the case remanded to the circuit court to: determine whether the elements of a private and/or public easement by prescription to walk the shore of Lake Huron are met; determine whether a public easement by custom exists; and/or for any necessary proceedings relating to defendant Mr. Goeckel's binding statements, which on their face leave no real controversy remaining between the parties?**

Plaintiff-Appellant answers "yes."

Defendants-Appellees did not address this question.

The Court of Appeals did not address this question.

The circuit court did not address this question.

## **STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT**

The published decision of the Court of Appeals which plaintiff-appellant seeks to have reviewed was entered May 13, 2004. By Order dated October 28, 2004, this Court granted plaintiff-appellant's application for leave to appeal. This Court has jurisdiction of this appeal of the decision of the Court of Appeals under Const 1963, art 6, § 4; MCR 7.301(A)(2).

## **STATEMENT OF FACTS**

This dispute focuses on a stretch of Lake Huron shoreline in northeast Michigan on the “Sunrise Side”, where the waters of the lake have groomed the shores to provide “miles of sandy beaches and breathtaking sunrises.” Official State travel website (Michigan Economic Development Corporation), [www.travel.michigan.org](http://www.travel.michigan.org), description of Oscoda. The parties properties are located just north of Oscoda on the Sunrise Side, in Greenbush Township, Alcona County. Plaintiff’s description of the Lake Huron shoreline in the area mirrors that of the state’s travel website – the sandy beaches stretch for miles. Plaintiff’s 3/4/02 brief opposing defendants’ motion for summary disposition in the circuit court (Appendix p 28a-70a), Affidavit of Joan Glass p 1 ¶ 2 (Appendix p 48a).

Plaintiff, a widow in her 70's, has owned her property west of US-23, across the highway from defendants’ riparian property on Lake Huron, since 1967. In her deed, plaintiff was granted a 15-foot easement for ingress and egress to Lake Huron across the north end of defendants’ property (3/4/02 brief, Exhibits 1, 2 and Affidavit of J Glass p 2 ¶ 12, Appendix pp 57a, 58a, 49a). Over the years since 1967, plaintiff, her children, and her grandchildren have at times used the beach portion of the easement for sunbathing and lounging, and have always used the easement to access the shore of Lake Huron to walk the beach. 3/4/02 brief, Affidavit of J Glass p 1 ¶5, p 2 ¶ 10, Appendix pp 48a, 49a; Declarations of C Stearns, C Ebner, K Gambicki, Appendix pp 54a, 55a, 56a.

The parties’ properties were once part of an overall parcel lying east and west of US-23 (3/4/02 brief, Affidavit of J Glass p 1 ¶¶ 2, 3, Appendix p 48a). In 1967 plaintiff and her husband purchased the non-riparian portion of the parcel on the west side of US-23, along with the express easement for access to Lake Huron. 3/4/02 brief, Exhibit 1 (Appendix p 57a). In 1974, Donald and Agnes Kushmaul purchased the riparian portion of the parcel, containing 400 feet of Lake Huron frontage (3/4/02 brief, Affidavit of J Glass p 2 ¶ 6, Appendix p 49a). Agnes Kushmaul in turn sold the north 135 feet of lakefront land to defendants in 1997 (3/4/02 brief, Exhibit 2, Appendix p 58a).

The present dispute arose in 1999, not long after the defendants purchased their lakefront property, when defendant Mr. Goeckel began harassing plaintiff and her family as they walked to and from the beach, and along the shore. Affidavit of J Glass p 2 ¶¶ 13, 14, Appendix p 49a. After

things deteriorated further (Affidavit of J Glass p 2 ¶ 14, Appendix p 49a), plaintiff filed this suit on May 10, 2001. In count 1 of her two-count complaint, plaintiff alleged that defendants had interfered with and obstructed her use of the easement. Count 2 alleged prescriptive rights for sunbathing, picnicking and lounging on the easement, which plaintiff claimed she and her family had been doing for over 37 years. In their answer, defendants denied the scope of use claimed by plaintiff, and in their counter-complaint sought injunctive relief against plaintiff's use of the easement for anything more than ingress and egress to Lake Huron.

During a show cause hearing on July 9, 2001, the parties reached agreement as to use of the easement, the terms of which were set out in a Preliminary Injunctive Order entered by the circuit court on July 19, 2001 (Appendix p 1a). The Order protected the status quo with respect to plaintiff's claimed historic use of the easement for sunbathing and lounging.

The issue which is the focus of this appeal did not arise until September 12, 2001, via defendants' first amended countercomplaint adding a counterclaim for injunctive relief against alleged trespass by plaintiff on property adjacent to the easement (Appendix pp 21a, 22a):

[Plaintiff] Joan M. Glass has, without lawful right trespassed upon the property of your Defendants adjacent to the easement which is the subject of the initial complaint and counter complaint interrupting and interfering with your Defendants exclusive right to possession.

In turn, plaintiff filed her first amended complaint on September 17, 2001, adding a third count seeking injunctive relief against defendants' interference with her right, as a member of the public, to walk the shore of Lake Huron below the ordinary high-water mark (Appendix pp 23a, 26a). Plaintiff alleged that the shore below the ordinary high water mark is held in trust for the benefit of the people for navigational and recreational activities, and that she has the right as a member of the public to navigate and walk along the shore of Lake Huron lying below the ordinary high-water mark free from interference by defendants (first amended complaint p 4 ¶¶ 22, 24, Appendix p 26a ). She also alleged that, under "local custom and practice", members of the public have for many years walked the shore of Lake Huron below the high-water mark in the area of defendants' property without interference by riparian property owners (first amended complaint p 4 ¶ 23, Appendix p 26a). On these bases, plaintiff sought injunctive relief requiring defendants to

cease interfering with plaintiff's right to navigate and walk the shore and waters of Lake Huron lying below the natural ordinary high-water mark (first amended complaint p 5 ¶ E, Appendix p 27a).

During his September 12, 2001 deposition, defendant Mr. Goeckel admitted that he habitually walks the beach along the Lake Huron shore above the water's edge, traveling in front of the lakefront properties of other owners. He also admitted that the public customarily walks the beach on the sand above the water's edge, which he understood belonged to the State:

Q. Do strangers walk along the beach in front of your property on a regular basis?

A. Yes.

Q. Travel over your property and other beach-front properties?

A. They're not traveling over my property. They're traveling next to the water's edge, which is the State of Michigan's property.

....

Q. Do you walk yourself along the beach near the water line traveling across other people's property?

A. Yes, I do.

Q. That is the custom, as you understand it, for people to walk the beach freely along near the water?

A. Yes.

....

Q. Okay. You indicated that you have no problem with strangers or anyone walking along the beach near the water's edge?

A. That's correct.

Q. And would that include walking on dry sand next to the water's edge? And by next to it I mean within a foot of the water's edge or two.

A. I have no problem with anybody doing that.

Q. So when people walk by on the beach in front of your home they don't walk in the water, their feet aren't wet?

A. That's fairly – that's pretty general. Some people walk in the water, some people walk on the sand. Depends if they got shoes on or they're barefoot.

3/4/02 brief, Exhibit 4( R Goeckel deposition transcript), pp 17-19, 35, Appendix pp 61a-63a, 65a.

Agnes Kushmaul, defendants' predecessor in title, likewise testified in her deposition that it is her custom, and that of the public, to walk along the beach near defendants' property. 3/4/02 brief Exhibit 5 (A Kushmaul deposition transcript) pp 14-15, Appendix pp 68a-69a.

On February 5, 2002 defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (9) seeking judgment in their favor against plaintiff's claim that she had the right to walk along the Lake Huron shore below the ordinary high water mark. Defendants also sought summary disposition under MCR 2.116(C)(8) and (10) of plaintiff's claim of prescriptive rights with respect to the easement. Defendants failed to file any supporting affidavits or documentary evidence in support of their motion.

On March 4, 2002 plaintiff filed her brief opposing defendants' motion and including a cross motion for summary disposition in her favor (Appendix pp 28a-70a). Included were plaintiff's own affidavit, declarations of witnesses, and transcripts of depositions of defendant Richard Goeckel and his predecessor in title, Agnes Kushmaul. In her cross motion for summary disposition, plaintiff argued her right as a member of the public to walk the shore of Lake Huron below the ordinary high-water mark, focusing on case law adopting the public trust doctrine and the Great Lakes Submerged Lands Act, MCL 324.32501 *et seq* (Appendix pp 71a-81a), particularly MCL 324.32502 (Appendix p 72a). Plaintiff conceded, however, that she was unaware of any Michigan case squarely addressing the issue. (3/4/02 brief pp. 10-15, Appendix pp 37a-42a).

During the March 11, 2002 hearing on the cross motions for summary disposition, counsel reached agreement as to the scope and use of the easement, while the court indicated it was taking under advisement the issue of whether plaintiff has the right to walk along the Lake Huron shore below the high-water mark. Subsequently, in an Opinion entered April 4, 2002, the circuit court ruled on the beach walking issue:

There is little dispute over the facts here . . . .

. . . .

Plaintiff claims that for a long time, both before and after purchasing the property, she and her family had used access to Lake Huron; had used the area around the beach for various purposes, and had walked up and down the beach without protest from anyone.

The issues that remain are two. The first is the extent to which the fifteen foot easement can be used. This issue was settled by the parties, on the record, and a written judgment containing settlement is being prepared.

The second issue is whether Plaintiff is allowed to use beach area for pedestrian travel lakeward of the high water mark. The Court has reviewed both arguments concerning this matter and is of the Opinion that there is no clear precedent here. However, it appears to this Court that Plaintiff has the better argument and the Court therefore rules in Plaintiff's favor. The Great Lakes Submerged Land Act, MCL § 324.32501 *et seq*, does provide for a specific definition of the high water mark of Lake Huron and does seem to support the argument that the Plaintiff's [sic] have the right to use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel.

Appendix pp 3a, 4a. An Order consistent with this Opinion was entered April 29, 2002 (Appendix pp 5a-6a).

The circuit court then entered its Order Establishing Easement Rights as a final order on June 26, 2002, implementing the agreed-upon terms concerning the scope of use of the 15-foot easement. Appendix pp 7a-8a.

Defendants filed their claim of appeal in the Court of Appeals on July 15, 2002. In their briefs, the parties only nominally addressed the decision in *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930), the principle case ultimately relied upon by the Court of Appeals in its decision (5/13/04 Court of Appeals decision, pp 3-9, Appendix pp 10a, 12a-18a). In an amicus curiae brief filed belatedly by Save our Shoreline ("SOS") in December 2003, SOS relied on *Hilt* extensively as the principle authority upon which the Court of Appeals should base its decision.<sup>1</sup> Oral arguments were heard less than a month later, on January 15, 2004.

In its 11-page published decision of May 13, 2004, the Court of Appeals adopted the reasoning based on *Hilt* advanced by SOS in its amicus brief, and reversed the circuit court's ruling (Appendix pp 10a-20a). The Court of Appeals first addressed the relative rights of the public and riparian owners under the common law public trust doctrine (decision pp 3-9, Appendix pp 12a-18a), and then under Michigan's Great Lakes Submerged Lands Act, MCL ¶ 324.32501 *et seq* (decision pp 9-10, Appendix pp 18a-19a). Relying principally on its interpretation of *Hilt*, the court held that under the public trust doctrine, the State of Michigan holds title to the shores of the Great Lakes up

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<sup>1</sup> The Court of Appeals granted SOS' motion to appear as amicus and to extend the time for filing an amicus brief in an Order dated December 18, 2003.

to high water, but the riparian owner has the exclusive right to use any exposed “dry” portions of the shore which are not at any given moment covered with water: “Although the riparian owner has the exclusive right to utilize such land [between low and high-water mark] while it remains dry, because it once again may become submerged, title remains with the state pursuant to the public trust doctrine.” Decision p 7, Appendix p 16a.

In reaching its conclusion, the Court of Appeals acknowledged that it was relying on dicta in *Hilt*, but opined it was “consistent with and germane to the actual holding in *Hilt*.” (decision p 7 n 7, Appendix p 16a). The court interpreted *Hilt* as holding that the riparian owner has “a movable freehold”, with the riparian’s boundary being established at the moving edge of the waters themselves (decision p 7, Appendix p 16a). The court concluded that, under the public trust doctrine, “because defendants have the right to the exclusive use and enjoyment of their land to the waters’ edge, we hold that they may properly prohibit plaintiff from traversing beyond the waters’ edge while adjacent to defendants’ property” (decision p 9, Appendix p 18a).

The Court of Appeals then turned to MCL § 324.32502 of the Great Lakes Submerged Lands Act (“GLSLA”), holding that the statute provides “no substantive rights”, and even if it did, it would not afford plaintiff any relief because it “contains no provision guaranteeing any member of the public the right to walk on a beach fronting private property along one of the Great Lakes.” (Decision p 10, Appendix p 19a).

On these bases, the Court of Appeals concluded that “The trial court’s ruling, to the extent it allowed plaintiff to traverse between the statutory ordinary high-water mark and the waters’ edge, is therefore reversed.” (decision pp 10-11, Appendix pp 19a-20a). The decision thus relegated plaintiff, who is now in her 70’s and has been walking the shore for some 40 years, to walking in the waters of Lake Huron to avoid trespassing on riparian rights.

## ARGUMENT

**ISSUE I: The Court of Appeals decision should be reversed because it deprives plaintiff and other members of the public of their right to walk the sovereign shores of the Great Lakes as established by more than a century of Michigan Supreme Court and United States Supreme Court decisions applying the public trust doctrine to the shores of the Great Lakes, and consistently holding that the public's rights of navigation and recreation extending up to the ordinary high water mark are inalienable.**

### **1. Introduction**

The circuit court properly ruled that plaintiff has the right as a member of the public to walk the shore of Lake Huron below the ordinary high water mark, a right plaintiff has been exercising for more than 37 years. The public has always had the right to walk the shores of the Great Lakes under decisions of the Michigan Supreme Court dating back more than a century. In these decisions, the Court adopted the public trust doctrine as enunciated in United States Supreme Court decisions dating back to the middle of the 19<sup>th</sup> century, which in turn adopted the common law doctrine dating back more than half a millennium.

In its decision, the Court of Appeals committed error of monumental proportion in reversing the circuit court and granting private riparian owners a right they have never had – exclusive possession of the exposed portions of the Lake Huron shore right down to the edge of the moving water. Although the Court of Appeals properly ruled that the state owns the shore up to the high water mark (decision p 9, Appendix 18a), it eviscerated the paramount rights of the public in these trust lands. The dire consequence of this ruling is that plaintiff and other members of the public must now walk in the waters of the Great Lakes to avoid trespassing on riparian rights (decision pp 10-11, Appendix pp 19a-20a).

The fundamental flaw in the Court of Appeals decision is its misinterpretation of this Court's 1930 ruling in *Hilt*, arising from the court's failure to comprehend the meaning of critical nomenclature used in *Hilt*. The Court of Appeals thus failed to grasp the central ruling in *Hilt*, and in the end sacrificed the essence of the ruling to a reliance on mere dicta. On the basis of this dicta, and in the absence of the substantive analysis which so weighty a subject demands, the Court of Appeals violated its solemn trustee obligation to protect the rights of countless members of the public in thousands of miles Michigan's sovereign Great Lakes shores.

Reversal of the Court of Appeals decision would not entail overruling any of this Court's prior decisions. Moreover, because the decision ignores landmark legal precedent at the expense of the State of Michigan and its people, the ruling of this Honorable Court is of grave moment.

## **2. Standard of Review**

De novo appellate review applies to this issue because this appeal arises from summary disposition in favor of plaintiff. Summary disposition rulings are reviewed de novo. *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 497; 635 NW2d 396 (2002).

In its decision, the Court of Appeals correctly treated the circuit court's ruling as having granted plaintiff summary disposition under MCR 2.116(C)(10), and properly determined the standard of review to be de novo (decision p 2, Appendix p 11a), with the motion being subject to the following standard:

Summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue about any material fact. When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider all pleadings, affidavits, depositions, and other documentary evidence in the light most favorable to the nonmoving party. The nonmoving party has the burden of rebutting the motion by showing, through evidentiary materials, that a genuine issue of disputed fact does exist. Citations omitted.

Decision p 3, Appendix p 12a. Further, summary disposition is properly granted to the nonmoving party under MCR 2.116(I)(2) if the court determines that the nonmoving party is entitled to judgment as a matter of law (decision p 3, Appendix p 12a).

## **3. Analysis**

The question before this Court, whether plaintiff has a right to walk the shore of Lake Huron below the ordinary high water mark, is governed by a legal doctrine dating back to antiquity and honored by most nations of the world – the public trust doctrine. The essence of the doctrine as it applies to the Great Lakes is that the waters, beds, and shores of these great inland seas are natural highways which are too important to the public to ever be subject to purely private ownership and control. *Illinois Central RR Co v Illinois*, 146 US 387, 459 (1892). The laws of most nations have assiduously guarded the public use of navigable waters within their borders, subjecting it to regulation by the state only to the extent necessary to preserve the public rights. *Id.*

Development of the scope of the public trust doctrine has been the province of the judiciary, particularly in addressing the validity of legislative grants of public trust resources into private ownership. See, e.g., Grant, *Underpinnings of the public trust doctrine: Lessons from Illinois Central Railroad*, 33 Ariz St L J 849, 849-850 (2001). The doctrine is to be distinguished from the federal navigational servitude, reserved by the United States government to regulate and improve navigation, although the fundamental public policy represented by both doctrines is to “keep natural water highways open for public use.” Shafer, Chris, *Public rights in Michigan’s streams: Toward a modern definition of navigability*, 45 Wayne L Rev 9, 94-95 (1999). Riparian owners take title to their property subject to both the public trust doctrine and the federal navigational servitude. *Id.*<sup>2</sup>

The public trust doctrine has been applied in protecting public rights to the navigable waters of our nation since the establishment of the original colonies. From its earliest decisions to the present, the United States Supreme Court has consistently held that the shores of navigable waters and the lands under them have a unique status in the law as “sovereign lands” infused with a public trust which each state is bound to respect. *Idaho v Coeur d’Alene Tribe of Idaho*, 521 US 261, 283 (1997). The Court has traced the origins of the public trust doctrine back to the Institutes of Justinian in Roman law, *Id.* at 284, which declared that “ ‘[b]y the law of nature’ certain resources are considered ‘common to all’: air, running water, sea, and shores of the sea.” Sanders, *The Institutes of Justinian* 73 (4<sup>th</sup> ed 1867) (translating the Institutes, Proemium, §§ 4-6).

In England, the public trust doctrine finds its roots in the 13<sup>th</sup> century in Magna Carta, after which the king had no power to grant subjects exclusive rights to fish, either for “shell-fish or floating fish”, on any portion of the land covered by navigable waters. *Martin v Waddell*, 41 US 367, 410 (1842). Under the English common law of the sea as it existed at the time of the American Revolution, the title and dominion of the sea where the tide ebbs and flows, including the beds and shores of the sea up to high water mark, were in the king. *Shively v Bowlby*, 152 US 1, 11-12

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<sup>2</sup> As reflected in 43 USC § 1314, private rights are subordinate to the federal navigational servitude: “The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership....” (emphasis added).

(1894).<sup>3</sup> These waters and lands were incapable of ordinary and private occupation, cultivation, or improvement. *Id.* Their natural and primary uses were public in nature – as highways of navigation and commerce. The title to these lands belonged to the king as the sovereign, with dominion over them being vested in him as the representative of the nation, for the welfare of the public. *Id.* Important policies underlying the English rule were observed by Justice Best in *Blundell v Catterall*, 5 B & Ald 268, 287; 106 Eng Rep 1190, 1197 (KB 1821):

The interruption of free access to the sea is a public nuisance . . . . The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours.

Emphasis added.<sup>4</sup>

The United States Supreme Court adopted the public trust doctrine according to the English common law of the sea, but enhanced and extended it over the years. *Coeur d’Alene Tribe of Idaho*, 521 US 284-285. The English law distinguished between waterways subject to the ebb and flow of the tide and those which were non-tidal. The King owned the beds of the former in trust for the public, while title to the beds of the latter was typically in the hands of private parties subject to the public’s right of passage. *Id.* at 285. The United States Supreme Court rejected this distinction early on, largely due to the presence of great inland lakes and rivers in America which find no counterpart in England, holding in *Barney v Keokuk*, 94 US 324, 337-338 (1877), that the individual states hold title in trust for the public to all navigable waters within their borders, not just tidal waters, because the states “ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience.” See *Coeur d’Alene Tribe*, 521 US 285-286.

The Court extended the public trust doctrine to the shores of the Great Lakes in its landmark decision in *Illinois Central RR Co v Illinois*, 146 US 387, 435-436 (1892). The decision, cited in literally hundreds of state and federal cases nationwide, enunciated the weighty public interests in

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<sup>3</sup> Consistent with the common law usage, the word “shore” as used herein means shore land lying below the ordinary high water mark.

<sup>4</sup> Justice Best’s observations in *Blundell v Catterall* were quoted with approval in *Illinois Central*, and more recently in *Matthews v Bay Head Improvement Assoc*, 95 NJ 306, 316-317; 471 A2d 355 (NJ 1984).

submerged lands and the perpetual duty of state legislatures to protect them under the public trust doctrine.<sup>5</sup>

At issue in *Illinois Central* was the validity of an act of the Illinois Legislature which granted to the railroad company the state's title to 1,000 acres of submerged lands of Lake Michigan in and around Chicago Harbor. The legislature repealed the act four years after enacting it, without providing for compensation to the railroad company. *Id.* at 448-49. The State of Illinois then sued in state court, claiming that the repeal revested any title of the railroad company back to the State, and seeking removal of the railroad company's improvements. *Id.* at 433, 439. The company argued that by revoking its proprietary interests the state violated the Contract Clause (US Const art I, § 10), and deprived it of its property without due process (*Id.* at 418).

At the outset, the Court in *Illinois Central* held that the same public trust doctrine applying to the open seas applies to the Great Lakes, on which "a large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea" *Id.* at 436. The English common law of the sea thus applies with all its force to the waters, beds, and shores of the Great Lakes:

These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.

....  
The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment . . . . We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

146 US 434-436 (emphasis added).

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<sup>5</sup> In his often cited article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 473, 489 (1970), Professor Sax refers to the decision as the "lodestar in American public trust law."

The Court in *Illinois Central* went on to enunciate the central ruling of the case – that the ownership of the submerged lands of Lake Michigan is “of public concern to the whole people of the state”, and that the trust under which they are held is therefore “governmental, and cannot be alienated”, except for parcels used to improve the public interests or disposed of without harming them. *Id.* at 455-56.

In support of its ruling, the Court cited its decision in *Martin v Waddell’s Lessee*, 41 US 367 (1842), which held that: “When the Revolution took place, the people of each state became themselves sovereign; and in that character, held the absolute right to all their navigable waters, and the soil under them; for their own common use....” *Id.* 41 at 410; quoted in *Illinois Central*, 146 US 456. In *Martin*, the Court ruled that this absolute sovereign right was the same as that exercised by the king in England, who held the “shores, and rivers and bays and arms of the sea” in trust for the benefit of the people, to be freely used for navigation and fishing. *Martin*, at 413-414.

The Court in *Illinois Central* then quoted from the early New Jersey decision in *Arnold v Mundy*, 6 NJL 1 (1821), a case which the Court believed was “entitled to great weight”:

‘The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.’

*Id.* at 78, quoted in *Illinois Central*, 146 US 456. The *Illinois Central* decision goes on to cite *Pollard v Hagan*, 3 How 212; 11 L Ed 565 (1845), as one of many other cases which could be cited for the rule that the beds of navigable waters are held by the state as sovereign, in trust for public uses for which they are adapted. *Illinois Central*, 146 US 457. <sup>6</sup>

Consistent with its fiduciary obligation as trustee, a state legislature can alienate only select parcels of sovereign Great Lakes trust lands to allow navigation-related improvements, or by

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<sup>6</sup> *Pollard* held that each state took title to the shores and beds of navigable waters upon its admission into the Union, up to highwater mark, under the equal footing doctrine. 3 How 225-230. Under *Pollard*, a state’s title to the sovereign lands lying below highwater mark of navigable waters is an inseparable attribute of its sovereignty, conferred by the United States Constitution itself. *Coeur d’Alene Tribe*, 521 US 261, 283 (1997); *Oregon ex rel State Land Bd v Corvallis Sand & Gravel Co*, 429 US 363, 374 (1977). The ruling in *Pollard* “has been followed in an unbroken line of cases” by the United States Supreme Court. *Corvallis Sand & Gravel*, 429 US 374.

conveyance to private parties of parcels which could otherwise serve public purposes better. *Illinois Central*, 146 US 457. But the Illinois Legislature’s extensive grant of Lake Michigan submerged lands in and around Chicago Harbor amounted to an abdication by the State of its general control “over lands under the navigable waters of an entire harbor or bay, or of a sea or lake . . . [which] is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.” *Id.* at 452-53.

*Illinois Central* makes clear that the state legislature “must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it” (146 US 460), and always retains the power to repeal or modify laws impacting trust lands, which by their very nature are subject to varying circumstances over time. *Id.* at 459-460. Moreover, the state legislature can no more abdicate its trustee obligations, leaving trust lands “entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.” *Id.* at 453. Any such grant is revocable, if not void from the start. *Id.* at 453, 460.<sup>7</sup>

Two years after *Illinois Central*, the United States Supreme Court rendered its decision in *Shively v Bowlby*, 152 US 1 (1894), a case which the Court later described as “the seminal case in American public trust jurisprudence.” *Phillips Petroleum Co v Mississippi*, 484 US 469, 473 (1988). In *Shively*, the Court re-affirmed that the English common law of the sea is the law of this country governing rights in the shore, except as specifically modified by state and federal law. 152 US 10-18. Under the law of the sea, a grant from the sovereign (the state) of land bounded by the sea does not pass title below the high water mark, unless the express language of the grant or “immemorial usage” under it unequivocally indicates such intention. *Id.* at 40-41.

Under *Shively*, the English common law of the sea applied to each new state upon its admission into the Union, with title and control of all lands below high water mark being vested in the state as sovereign. These sovereign lands “are incapable of cultivation or improvement in the

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<sup>7</sup> For a discussion of the origins of this ruling in the reserved powers doctrine, see Grant D, *Underpinnings of the public trust doctrine: Lessons from Illinois Central Railroad*, 33 Ariz St L J 849 (2001).

manner of lands above high-water mark”, yet “are of great value to the public for the purposes of commerce, navigation, and fishery.” 152 US 57. Limited improvement of lands below the high water mark, when permitted by the state, is “subordinate to the public use and right.” *Id.* Because title and control of these lands is vested in the state for the benefit of the people, the title and rights of riparian owners in the land below the high water mark are “governed by the laws of the several states, subject to the rights granted to the United States by the constitution.” 152 US 57-58.

The Court in *Shively*, after surveying the laws of the early states as to rights of riparian owners, noted that some states had granted riparians greater rights in the shore than they had in England, while others had remained faithful to the English common law of the sea under which the riparian owner has no title below the high water mark. 152 US 18-26.<sup>8</sup>

The general rule from *Illinois Central* and *Shively* is that each of the eight states bordering the Great Lakes has a solemn and inalienable trustee obligation to protect the paramount rights of the public in the waters, beds, and shores of these great inland seas. Upon its admission to the Union, each state’s title to trust lands within its borders extended up to high water mark. State legislatures are free to govern the title and rights of riparian owners in trust lands as they see fit over time – subject always to the paramount rights of the people. Where a state’s grant of rights in trust lands to private parties is extensive enough to injure the paramount rights of the public, it is revocable, if not void from the start. In the absence of specific state legislation, or immemorial usage under a grant from the state, the common law of the sea governs the shores of the Great Lakes. *Illinois Central*; *Shively*.

At the time of the United States Supreme Court’s decisions in *Illinois Central* and *Shively* in the early 1890’s, there was no precedent in Michigan law defining the boundary of Great Lakes trust lands. *People v Silberwood*, 110 Mich 103, 106; 67 NW 1087 (1896). Although the boundary was discussed by the Michigan Supreme Court in *Lincoln v Davis*, 53 Mich 375; 19 NW 103 (1884), the Court made no decision on the issue. In *Lincoln v Davis*, the plaintiff had attempted to trap-fish

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<sup>8</sup> Although technically the owner of land on the shores of a lake is a littoral owner while a riparian owner is one owning land abutting a river, the term “riparian owner” is used herein to refer to private property owners on any lake, river or stream, consistent with its ubiquitous use in the cases.

in Lake Huron more than a mile from shore, consistent with a statute restricting public fishing rights in waters bordering land where fish are taken by the riparian owner (*id.* at 389). The defendant obstructed the plaintiff's fishing, claiming that his lessor, the abutting riparian owner, owned all of the bed of Lake Huron in front of his land. *Id.* at 377, 389. The majority held that the statutory rule was valid, and that plaintiff was within his rights as a member of the public to fish outside the statutorily-protected zone (*id.* at 389). In his concurrence, Justice Champlin opined that the Great Lakes are governed by the common law of the sea (*id.* at 384-85), but he was less certain as to the boundary between riparian owners and the state, indicating that it "would seem" that because "there is no periodical ebb and flow of tide in these waters, the limit should be at low instead of at high water mark." *Id.* at 385.

Within a decade of *Illinois Central* and *Shively*, the Michigan Supreme Court adopted the public trust doctrine enunciated in *Illinois Central* in full measure, adding Michigan to the states categorized in *Shively* as remaining faithful to the common law of the sea. *People v Silberwood*, 110 Mich 103, 67 NW 1087 (1896); *State v Lake St. Clair Fishing & Shooting Club*, 127 Mich 580; 87 NW 117 (1901); *State v Venice of America Land Co*, 160 Mich 680, 125 NW 770 (1910).

In *Silberwood*, 110 Mich 103, 67 NW 1087 (1896), which upheld the validity of a state statute setting aside submerged lands in Lake Erie and the Detroit River for public shooting grounds, the Court adopted *Illinois Central* ruling *carte blanche*. After reviewing its prior decisions, the Court noted that the question of the title to the beds of the Great Lakes was not directly at issue in any of them. *Silberwood*, at 106. The Court went on to quote extensively from *Illinois Central* for three pages, concluding that its reasoning "is without flaw, and . . . the law enunciated therein ought to stand as the law of this state. It commends itself to one's reason and judgment, and avoids many difficulties incident to a different construction of the law." (*Silberwood*, at 108), while at the same time being "in harmony with the decisions in all of the states bordering on these great seas." *Id.* at 108-09.

Five years later, in *State v Lake St. Clair Fishing & Shooting Club*, 127 Mich 580; 87 NW 117 (1901), the Court confirmed its adoption of the public trust doctrine as enunciated in *Illinois Central* in ruling that the statute of limitations for adverse possession does not apply to Great Lakes

lands lying below high water mark. Against the state's claim of title to a strip of land along the south end of Harsen's Island at the mouth of the St. Clair River, on which cottages and hotels had been built, the defendants claimed title by adverse possession. At the outset of its ruling, the Court affirmed that the public rights in Great Lakes waters extend to the high water mark:

We must take judicial notice that the Great Lakes are navigable waters, and while, as in all cases of water, there must be a line where the water meets the shore, and consequently shallows, the legal characteristics of navigable water attach to all of it. It is an old and well-settled rule that the privileges of the public are not limited to the channel, or to those parts which are most frequently used, but extend to high-water mark in all tide waters.

127 Mich 585-586 (emphasis added). The Court went on to hold that the disputed land formed part of the lake bed when the State was admitted to the Union in 1837. The State held title to the land because, when Michigan was carved from the Northwest Territory, it took title to the submerged lands of the Great Lakes under the Ordinance of 1787 "in trust for a public use for the people of the states, and subject to the rights of navigation by people of the entire country" (127 Mich 593).<sup>9</sup> On the State's admission into the Union, "all of said submerged land covered by this lake, to high-water mark, passed to the state in its sovereign right, – not as private proprietor, and subject to sale, but in trust for the public." 127 Mich 601 (emphasis added).

The Court in *St. Clair Fishing & Shooting Club* followed the rule in *Illinois Central* that the state legislature has no power to dispose of the State's sovereign dominion and control over Great Lakes waters and lands contrary to the trust under which the state holds them for the people. 127 Mich 593-594. The Court thus concluded that the state's statute of limitations for adverse possession was wholly inapplicable to submerged lands because the legislature could not have intended to subject the public's rights of navigation and fishing to the private and exclusive title acquired by occupancy. *Id.* at 597. It was "unreasonable to suppose that the [Michigan] legislature intended to allow title to be acquired to the bed of the Great Lakes, when it had never permitted its sale" and

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<sup>9</sup> The full text of the relevant portion of the Northwest Ordinance reads: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor." *An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio*, Art 4, July 13, 1787.

instead had “always manifested an intention to discharge the trust by preserving it for public uses.” *Id.* at 600.

Within a decade of *St Clair Fishing & Shooting Club*, the Court in *State v Venice of America Land Co*, 160 Mich 680, 125 NW 770 (1910), again re-affirmed its commitment to the rule of *Illinois Central*, in a suit by the State to quiet title to hundreds of acres of land forming a southern part of Harsen’s Island, to which the defendant claimed ownership through a chain of title dating back to the British. The circuit court, following *St. Clair Fishing and Shooting Club*, held that the condition of the land when the State was admitted to the Union in 1837 controls title (160 Mich 689). In determining the character of the disputed land in 1837, the circuit court held on the basis of extensive evidence that while the Great Lakes have no appreciable tides, their waters vary in level from year to year, season to season, and under high winds. 160 Mich 690. The highest water on Harsen’s Island was during 1837-38, which marked an “epoch of high water.” *Id.* The circuit court concluded that the disputed land was covered by the waters of Lake St. Clair when the State was admitted, so that title was vested in the State in trust for the people (160 Mich 691). This Court affirmed the circuit court’s ruling in all respects (*Id.* at 701).

The ruling in *Venice of America Land Co* “committed this court, if it had not been committed before, to the [public] trust doctrine”, including its fundamental principle that the state holds title of all lands below high water mark as at common law (concurring opinion of Justice Fellows in *Collins v Gerhardt*, 237 Mich 38, 62-63; 211 NW 115 (1926)).

By its decisions in *St Clair Fishing & Shooting Club* and *Venice of America Land Co*. adopting the full reach of the public trust doctrine enunciated in *Illinois Central*, the Michigan Supreme Court placed our state squarely within the group of states noted in *Shively* which remained faithful to the common law of the sea – and under which a riparian owner holds title only to the land above high water mark, along with rights of access to and contact with the water, while the state holds the beds and shores of the lakes in trust for the public. *Shively*, 152 US 18-26.

The Michigan Supreme Court later summarized the evolution of the public trust doctrine in sweeping terms:

There has arisen, out of centuries of effort, limitation of crown prerogative, parliamentary action, numerous adjudications, common necessity, and public forethought, a rule beyond question, impressing rights of the public upon all navigable waters.

The trust is a common-law one; it prevailed in England long before the American Revolution . . . it continued during the period the United States held the Northwest Territory and passed as the same trust to the state of Michigan at her admission to the Union; it has not changed in character or purpose and is an inalienable obligation of sovereignty . . . . The state may not, by grant, surrender such public rights any more than it can abdicate the police power or other essential power of government.

*Nedtweg v Wallace*, 237 Mich 14, 17; 208 NW 51 (1926) (emphasis added).

While the State of Michigan thus holds title to the shores and beds of the Great Lakes under an inalienable trust for the people, a different rule arose in Michigan law governing inland lakes and rivers. Early on, title to the beds of all Michigan waters other than the Great Lakes was declared to be in the riparian owners. *Lorman v Benson*, 8 Mich 18 (1860). The title of riparian owners to the beds of rivers extends to the center of the stream, *Collins v Gerhardt*, 237 Mich 38, 48, 211 NW 115 (1926), while the title of riparian owners on inland lakes extends to the center of the lake bed, *Hall v Wantz*, 336 Mich 112, 116, 57 NW2d 462 (1953). However, on all inland lakes and streams considered “navigable”, the title of the riparian owner is subordinate to the inalienable rights of the people to navigate and fish in the waters. *Collins*, 237 Mich 43-48.<sup>10</sup>

In the decade ending in 1930, the public trust doctrine applying to the Great Lakes arose again, albeit incidentally, in *Kavanaugh v Rabior*, 222 Mich 68; 192 NW 623 (1923), and *Kavanaugh v Baird*, 241 Mich 240; 217 NW 2 (1928), the “*Kavanaugh* cases”, and in *Hilt* which overruled them. The net effect of these cases was to leave Michigan law governing the Great Lakes shores undisturbed. The cases are thus of no legal consequence here, except to the extent that the Court of Appeals decision relies on a fundamental misinterpretation of *Hilt* as discussed *infra*.

In *Obrecht v National Gypsum Co*, 361 Mich 399, 412-416; 105 NW2d 143 (1960), the Court re-affirmed its rulings in *St Clair Fishing & Shooting Club* and *Venice of America Land Co* in

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<sup>10</sup> For more than 100 years, inland lakes and streams were considered “navigable” if they were capable of floating logs and rafts, but this test was abandoned in favor of the recreational boat test to reflect the changing needs of the public in *Bott v Michigan Dept of Natural Resources*, 415 Mich 45, 109-110; 327 N2d 838 (1982).

holding that the public's rights to the submerged lands of Lake Huron were paramount over National Gypsum's asserted right of wharfage as a riparian owner, a right which could be exercised only with the regulatory assent of the State. In so ruling, the Court emphasized the continued vitality of Michigan's long commitment to the public trust doctrine as enunciated in *Illinois Central*:

This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the ... beds of five Great Lakes. Long ago we committed ourselves to the universally accepted rules of such trusteeship as announced by the Supreme Court in *Illinois Central*, 146 US 387 (1892).

361 Mich 412, citing *St Clair Fishing & Shooting Club, State v Venice of America Land Co*, and *Nedtweg v Wallace, supra*.<sup>11</sup> The Court held that "no part of the beds of the Great Lakes, belonging to Michigan and not coming within the purview of previous legislation . . . can be alienated or otherwise devoted to private use", except where a given parcel is conveyed for improvement of the public interest, or at least without harming it. 361 Mich 412-413. Examples of such exceptional conveyances include statutes authorizing conveyances of isolated Great Lakes submerged lands to Detroit Edison Company and Consumers Power Company, and to the Mackinac County board of road commissioners for bridge construction. 361 Mich 413.

The Court in *Obrecht* recognized the threat posed to the public's use and enjoyment of our Great Lakes if riparian interests were permitted to prevail over those of the public:

In the case before us Michigan's great natural resource, providing as it does general public enjoyment of the pure blue waters of these incomparable inland seas, is subtly threatened by a projected rule of the common law – the riparian right to wharf out. We recognize the rule and the right, yet hold them subject to reasonable regulation by the State. In effect and in sum, this Court is asked . . . to grant such rule an untrammelled legal beachhead on this limited part of Tawas Bay. Convinced that any such grant would open our shoal waters and renowned miles of sandy beaches to ruthless and uncontrolled exploitation, we are not so inclined.

361 Mich 416-417.

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<sup>11</sup> *Obrecht* was a forerunner of other similar cases across the nation which breathed new life and vitality into the public trust doctrine: "Although the courts recognized and enforced public trust constraints in the nineteenth century, the doctrine lay quiescent through much of the present [twentieth] century. Then, beginning in the late 1960's, it was revived and expanded to cover additional natural resources and to place new constraints on state management of those resources." Manaster & Selmi, 1 State Environmental Law 15 § 4.9 (2003).

To summarize, the public trust doctrine which this Court has consistently applied to the Great Lakes for over a century embraces the following basic principles: (1) The State of Michigan holds title to the shores of the Great Lakes up to the ordinary high water mark, in trust for the use and benefit of the public; (2) A grant from the state of riparian land bounded by one of the Great Lakes does not pass title below the high-water mark, unless such an intent is expressed in unequivocal terms; and (3) The state cannot abdicate its obligation to protect the paramount interests of the public in sovereign trust lands, although it can selectively release specified parcels to private parties to improve public interests. *Illinois Central, Silberwood, St. Clair Fishing & Shooting Club; Venice of America Land Co; and Obrecht, supra.*

In its decision here, the Court of Appeals ran afoul of all three of these fundamental principles by radically expanding the rights of private riparian owners to include a right they have never before been granted by the State of Michigan – exclusive possession of her 3,200 miles of Great Lakes shores. The path followed by the Court of Appeals in reaching its decision is marked by a fundamental misunderstanding of key nomenclature used in *Hilt*, and a perversion of the common law rule of reliction. In wresting *Hilt* from its legal setting and misapplying it to a factual setting having nothing to do with accretion and reliction, the Court of Appeals impermissibly abdicated the state’s solemn duty to protect the paramount rights of the public in thousands of miles of Great Lakes shores surrounding the two peninsulas of Michigan. At the same time, the court deprived plaintiff and other people in Alcona County of a public right they have exercised by long custom – walking the beach.

Despite these fundamental errors, the Court of Appeals properly ruled that title between the high and low water marks “remains with the state pursuant to the public trust doctrine.” 5/13/2004 decision p 7, Appendix p 16a. However, by thus holding that the state holds title to the shore in trust for the people, while granting riparian owners exclusive possession of these trust lands to the extent they are exposed from moment to moment, the Court of Appeals gave birth to a novel rule which is unmatched in Michigan property law – granting private parties exclusive possession of sovereign public lands which have long been used by the people for their benefit and enjoyment.

**A. The common law riparian rule of accretion and reliction adopted by this Court applies only to non-trust lands above the ordinary high water mark.**

A proper understanding of the legal errors made by the Court of Appeals requires a step back in time to this Court's 1930 decision in *Hilt*, in which the Court overruled its decisions just several years prior in *Kavanaugh v Rabior*, 222 Mich 68, 192 NW 623 (1923), and *Kavanaugh v Baird*, 241 Mich 240, 217 NW 2 (1928). In these by now infamous *Kavanaugh* cases, as in *Hilt*, the land in dispute was formed by reliction, and governed by the common law rule of accretion and reliction set out in *People v Warner*, 116 Mich 228; 74 NW 705 (1898), and *Nedtweg v Wallace*, 237 Mich 14, 208 NW 51 (1926), two cases which are cited repeatedly in *Hilt*. *Id.* at 203, 208, 215-216, 224-225.

In *Warner*, the State claimed title to partially submerged land bordering an island in Saginaw Bay. The defendant, who owned the island, claimed title to the disputed land under the common law riparian rule of accretion. The Court held that the defendant would have title to the disputed land only if it had been formed by gradual, imperceptible accumulation of soil against defendant's land, or by reliction, a question for the jury to determine on remand. 116 Mich 238-240.

Accretion and reliction came to the fore again in *Nedtweg*, which upheld the validity of a statute (1913 PA 326) allowing the State to lease dry, relict land in Lake St. Clair. The opening sentence of the decision states: "Reliction has rendered several thousand acres of the bed of Lake St. Clair suitable for cottages and summer homes." 237 Mich 15. The Court spoke of the public trust doctrine in expansive terms, concluding that:

The rights of the public, of which the state, in its sovereign governmental capacity, acts as trustee, have been sedulously protected; not in prohibiting grants by the state of private rights to relict lake beds or the rule of riparian ownership, for such would restrict the proprietary sovereignty, but in denying the power, by grant or otherwise, to abdicate the trust by placing use and control in private hands to the curtailment or exclusion of public use.

237 Mich 21 (emphasis added). On rehearing, the Court carefully, and almost presciently for present purposes, defined the common law meaning of the term "reliction":

In the former opinion we stated: 'Reliction has rendered several thousand acres of the bed of Lake St. Clair suitable for cottages and summer homes.' We did not employ the term reliction in the restricted sense of land uncovered by a recession of water, but in the broader sense of former lake bed unfitted by recession of water and accretion for purposes of navigation, hunting, and fishing, and thereby rendered suitable for human occupation . . .

Beds of the Great Lakes, involving no riparian or littoral rights, unfitted for navigation, hunting, or fishing by permanent recession of waters, reliction, accretion, or alluvion, and useful for residence purposes with or without shoring or dredging, may be leased by the state in its proprietary capacity under legislative authorization.

237 Mich 14, 15 (emphasis added).

The interaction between the common law rule of reliction and accretion and the ordinary high water mark can be understood from the “movable freehold” concept introduced into American law in *Jefferis v East Omaha Land Co*, 134 US 178 (1890). The land in dispute in *Jefferis* was dry upland on the Missouri River formed by accretion over a 17-year period. The accreted land had been “formed by natural causes and imperceptible degrees”, so slowly that it could not be observed in progress, and “the new land so formed became high and dry, above the usual highwater mark.” 134 US 181-182 (emphasis added). The Court held that the accreted land belonged to the riparian owner under the common law rule of accretion and reliction. In so ruling, the Court cited the old English case of *Rex v Lord Yarborough*, 3 Barn & C 91 (King’s Bench) which articulated the rule in terms of a movable freehold: “in cases of alternate accretion and decrection the riparian proprietors had ‘movable freeholds’; that is, moving into the river with the soil as it was imperceptibly formed, and then again receding, when by attrition it was worn away.” *Jefferis* at 193-194.

As clear from *Jefferis*, the movable boundary of the riparian owner’s movable freehold is the high water mark, with the new upland slowly and imperceptibly formed by accretion and reliction being “high and dry, above the usual highwater mark” (134 US 181). The United States Supreme Court expressed this well-settled common law principle even more succinctly nearly a century later in *California v US*, 457 US 273, 275-76 (1982): “One hundred and eighty-four acres of upland were created by the seaward movement of the ordinary high-water mark.” (457 US 275-276).

**B. The net impact of the Court’s decisions in the *Kavanaugh* cases and *Hilt v Weber* was to leave the long-established public trust doctrine governing Michigan’s Great Lakes shores undisturbed.**

In the decades following the *Illinois Central* decision in 1892, the Michigan Supreme Court strayed from the common law rule of accretion and reliction only once, in the *Kavanaugh* cases decided in the 1920’s. *Kavanaugh v Rabior*, 222 Mich 68; 192 NW 623 (1923) (“*Rabior*”);

*Kavanaugh v Baird*, 241 Mich 240; 217 NW 2 (1928) (“*Baird*”). In the *Kavanaugh* cases, the Court granted title of dry relicted upland above highwater mark and extending up to the meander line of Lake Huron to the state instead of the riparian owner. The Court thus crossed the well-settled line separating the title of Great Lakes riparian owners from that held by the state in trust for the people, – the high water mark – and expanded the reach of trust lands upland to the meander line.

The land at issue in the *Kavanaugh* cases was dry upland formed by reliction and accretion along the shore of Lake Huron in Saginaw Bay, extending upland 280 feet from the shore to the meander line of the lake. *Rabior*, 222 Mich 68; *Baird*, 241 Mich 242. The plaintiff in both cases, owner of the bordering riparian land, claimed title to the relicted land, which had been platted into lots and leased to parties who erected cottages and paid rent to plaintiff. *Id.* The dispute in *Rabior* was over a summer cottage which the defendant had built on a portion of the relicted land, while in *Baird* the plaintiff sought to quiet title to the land against the State.

The Court in the *Kavanaugh* cases held that title to the riparian owner’s land ended at the meander line, while title to all dry land formed by accretion and reliction, extending from the meander line to the water, was held by the State in trust for public use, subject to riparian rights of the upland owner to cross the accreted dry land to reach navigable waters (*Baird*, 241 Mich 253-254). The Court based its decision on the premise that the meander line fixed the boundary of the riparian owner at the time the State was admitted into the Union. *Baird*, 241 Mich 244.

The ruling in the *Kavanaugh* cases not only ran afoul of the common law rule that accreted and relicted land belongs to the riparian owner, it violated the universally-accepted common law riparian rule ensuring contact with and access to the adjacent water. In doing so, the ruling effectively cut off many riparian owners from any contact at all with the waters defining their property as riparian in the first instance. The decisions opened a pandora’s box– unsettling vested rights and titles of Great Lakes riparian owners all around the state. See Steinberg, *God’s Terminus: Boundaries, Nature, and Property on the Michigan Shore*,” *American Journal of Legal History*, Vol XXXVII, 65-90 at 77, reviewing the history of the *Kavanaugh* cases (SOS’ amicus brief in the Court of Appeals, Exhibit A).

Within two years of its decision in *Baird*, the Court in *Hilt* overruled the *Kavanaugh* cases and restored the long-settled public trust doctrine governing Michigan's Great Lakes shores. As the Court in *Hilt* emphasized at the outset, the case is pure and simply about relicted land:

Lest we be misled, we must keep it clear that the issue is not as to the ownership of submerged land or of an island arising out of the lake or of lands beyond lines established as definite boundaries by the government or of other distinguishable premises. It covers only dry land, extending meandered upland by gradual and imperceptible accession or recession of the water, on the lake side of the meander line."

*Hilt*, at 198.<sup>12</sup> The task before the Court was to determine whether the State or a riparian owner had title to a strip of dry relicted land extending from a stake in the shore of Lake Michigan located 100 feet landward of the water, upland to a surveyed meander line located 277 feet from the water. The meander line extended along a ledge elevated 44 feet above the level of Lake Michigan. Some of the disputed strip had always been upland since before admission of the State into the Union, while the rest had been made dry by the "gradual, imperceptible, and natural" processes of reliction and accession. 252 Mich 201-02.

En route to its central ruling as to ownership of the relicted land, the Court in *Hilt* overruled the *Kavanaugh* cases as a radical departure from prior decisions holding that meander lines do not define the boundary of the shore line. Rather, meander lines are inaccurate representations of the shore, originally run by surveyors to plat the land and ascertain the quantity of upland to be granted, and never intended to be the boundary between title of the riparian and that of the State. Instead, that boundary is located at the "water's edge." *Hilt*, at 202-213.

The Court's use of "water's edge" is consistent with the nomenclature of many other state and federal cases using "water's edge" to mean "high water mark." A careful reading of *Hilt* establishes that the Court could have intended no other meaning by this nomenclature. The *Hilt* decision cites *Hardin v Jordan*, 140 US 371 (1890) for its holding that "Under the federal law when he bought, then, the purchaser from the government of public land on the Great Lakes took title to

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<sup>12</sup> In 1913 PA 326 (in effect at the time of *Hilt*) the government had established the high water marks of the Great Lakes as definite boundaries. See *McKnight v Broedell*, 212 F Supp 45, 49 (1962), (the 1913 act recognized the principle that "a state, when admitted into the Union, becomes entitled to land under navigable water below the high-water mark").

the water's edge." *Hilt*, at 206. In *Hardin*, the Court held that "it has been distinctly settled" that grants from the government of public land bordering on tide-water "extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state..." (140 US 381, emphasis added). Elsewhere in *Hardin*, the Court uses "high-water mark" synonymously with "water's edge." *Id.* at 383 ("In the one case . . . the government grant was held to extend only to high water mark . . . [where] the state, by its general law, does not allow the grant to inure to the individual further than to the water's edge.").

As the New Hampshire Supreme Court held in *State v Great Falls Mfg Co*, 76 NH 373; 83 A 126, 127 (1912): "There was a general understanding that . . . when it was said that the title of the littoral owners extended to the "water's edge", the idea intended was that it was limited by the high-water mark." (Emphasis added). Later, in *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 NH 82; 649 A2d 604 (1994), the New Hampshire Court held that:

'No serious inconvenience has arisen from the adoption of the water's edge as the boundary of public and private ownership. . . . [T]he introduction of any line other than high-water mark . . . would overturn common-law rights that had been established here, by a usage and traditional understanding of two hundred years' duration.'"

139 NH 89, citations omitted (emphasis added). To like effect, the court in *City of Little Rock v Jeuryens*, 133 Ark 126; 202 SW 45, 47 (1918), stated that: "By water's edge, as here used, we mean, of course, the ordinary high-water mark, as the state has title to the navigable waters and to the soil beneath by virtue of its sovereignty." (emphasis added).

With the same understanding of the "water's edge" nomenclature, in *People v Murray*, 54 Mich App 685, 687-89; 221 NW2d 604 (1974), the Court of Appeals followed *Hilt* in holding that the State's title under the public trust doctrine extends to the high water mark on the Great Lakes, quoting the following passage from *Hilt*: "A patent from the government was intended to carry title to the water's edge." 54 Mich App 689, quoting *Hilt*, at 204-205. <sup>13</sup>

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<sup>13</sup> For other cases using the nomenclature "water's edge" to mean "high water mark", see: *Oregon v Corvallis Sand and Gravel Co*, 429 US 363, 389 (1977), ("water's edge" and "high-water mark" used interchangeably in describing the decision in *Barney v Keokuk*, 94 US 324 (1877); *Wright v Day*, 33 Wis 260; 1873 WL 5789 at p. 2 (1873), (a call to a river in a deed description "can mean nothing less than the water's edge or high-water mark of the stream"; *Gould v Hudson River RR Co*, 12 Barb 616 (NY 1852), (riparian owners have "the exclusive right to the shore down to the

In short, “water’s edge” means the high water mark in *Hilt* just as it does in virtually every relevant federal and state court decision where the language is used. The nomenclature is also consistent with the laws of nature, inasmuch as the actual physical location of the line marked by the constantly moving waters of the Great Lakes is the high water mark. It is the line up to which the waters of these inland seas persistently reach, as gently lapping waves give way to pounding surf, and vice versa, on a recurring basis. The waters thus establish the ordinary high water mark of the common law – a line below which the presence of water is so pervasive that it distinctly marks the soil and vegetation, rendering it unfit for human habitation or agriculture. *McKnight v Broedell*, 212 F Supp 45, 50-51 (ED MI 1962).

In overruling the *Kavanaugh* cases and returning the boundary of trust lands from the meander line back to the high water mark, the effect of *Hilt* was to reinstate the common law of the sea as the law of this state: “Until the *Kavanaugh* cases . . . this court was in accord with other American courts in applying the common law of waters and had not established a rule of property as to land upon the Great Lakes contrary to the law of the sea” (252 Mich 213); and “this court [is] squarely planted upon the common law . . . of the sea” under which a permanent change of condition during private ownership works a change of title (252 Mich 216).

In deciding the central issue of the case, whether the dry relicted land in dispute belonged to the riparian owner or the state, the Court again looked to the common law of the sea, and particularly its rule of accretion and reliction. Under that rule, title to dry land formed by accretion or reliction belongs to the riparian owner, following the shore line as altered by gradual and imperceptible deposits over time, so that the riparian owns a movable freehold. 252 Mich 219. The common law rule of reliction preserves the riparian owner’s right of access to the water, and the indispensable requirement of the common law riparian doctrine of actual contact of the land with the water. *Hilt*,

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water’s edge, at high water mark.”); *Hogg v Beerman*, 41 Ohio St 81, 91 (1884), (under “the uniform doctrine in the United States” land bordering on a bay or lake “extends to the high water-mark or to the water’s edge.”); *Wilt v Endicott*, 68 Or App 481, 485; 684 P2d 595 (1984), (“the presumption is that the title extends only to the water’s edge”, and “the words ‘to the bank’ have been construed as conveying only to the high water mark.”); and *State v Hardee*, 259 SC 535, 540;193 SE2d 497 (1972), (“If the boundary be a navigable stream . . . the land extends only to the water’s edge, or to high water mark.”). Emphasis added.

252 Mich 218-220. The decision in the *Kavanaugh* cases ran afoul of this common law rule, and in doing so overruled the Court's prior ruling in *People v Warner*, 116 Mich 228; 74 NW 705 (1898), that title to relicted land belongs to the riparian owner. 252 Mich 220-222.

In *Hilt*, the Court used "reliction" to mean the process by which new upland is formed under "gradual, imperceptible" processes (252 Mich 201), and which "has continuously remained dry" (252 Mich 206) – precisely the same way the Court used "reliction" in *Nedtweg* four years earlier. Under *Nedtweg*, relicted land means former lake bed rendered dry by the "permanent" recession of waters under the processes of reliction or accretion, which is suitable for human occupation, but unfit for navigation and recreation – in other words, land above the ordinary high water mark. *Nedtweg v Wallace, on rehearing*, 237 Mich 14, 15; 211 NW 647 (1927) (emphasis added).

To the same effect, under the movable freehold concept referred to in *Hilt* (252 Mich 219), the riparian owner has a movable boundary defined at the ordinary high water mark, above which new upland may be slowly and imperceptibly formed by accretion and reliction to move the ordinary high water mark lakeward. *Jefferis, supra*, 134 US 193-194.

Thus in *Hilt*, as in *Silberwood*; *St Clair Fishing & Shooting Club*; and *State of Venice Land Co*, the Michigan Supreme Court did not waver from the fundamental rule it had long since adopted from *Illinois Cental*, under which the shores of the Great Lakes up to the high water mark are the sovereign property of the State of Michigan, held in trust for the use and welfare of the public. The new rule enunciated by the Court of Appeals, that members of the public exercising their rights of navigation and recreation on the trust lands of the Great Lakes must keep their feet in the water or run the risk of trespassing on private property rights, finds no support in *Hilt*.

In its decision, the Court of Appeals lost sight of the difference between the dry relicted upland in *Hilt*, and the barren reaches of the shore below high water mark where Great Lakes waters persistently exert their influence to leave the land unfit for human occupation. The critical point at which the Court of Appeals went astray starts with its quote of the following passage from *Hilt* (quoted here in its entirety): "it has been held that the public has no right of passage over dry land between low and high-water mark but the exclusive use is in the riparian owner, [although the title is in the state]." *Hilt*, 252 Mich 226; Court of Appeals decision p 7, Appendix p 16a. The Court

of Appeals acknowledged that this passage is dicta (*id.*), but nonetheless elevated it to a binding rule of law:

This principle in *Hilt* is dicta, since the dispute in that case did not involve the public's right to access relicted land. However, the principle was endorsed by the *Hilt* Court, and it is consistent with and germane to the actual holding in *Hilt*, i.e., that the riparian owner has exclusive use to the land running to the waters' edge. *People v Schaub*, 254 Mich App 110, 117 n 2; 656 NW2d 824 (2002).<sup>14</sup>

Having thus expanded the accretion and reliction ruling in *Hilt* beyond all legitimate bounds, to ensnare the shores of the Great Lakes below highwater mark, the Court of Appeals went on to hold at page 7 of its decision (Appendix p 16a) that:

Although the riparian owner has the exclusive right to utilize such land [between high and low water mark] while it remains dry, because it once again may become submerged, title remains with the state pursuant to the public trust doctrine. *Id.* This is so because a riparian owner cannot interfere with the public's right to the free and unobstructed use of navigable *waters* for navigation purposes.

For the first time in Michigan, the Court of Appeals thus granted the Great Lakes riparian owner exclusive possession of the shores of the Great Lakes – and it did so relying on mere dicta. This grant of exclusive possession of the shores of the Great Lakes to private parties is repugnant to the common law of the sea which this Court has consistently applied to the Great Lakes since it was adopted as the law of the State in *Silberwood*; *St. Clair Fishing & Shooting Club*; and *Venice of America Land Co.*

Because the dicta in *Hilt* referring to exclusive rights of riparians between low and high water marks led the Court of Appeals down the wrong path in making a decision which has no precedent in our state's law, it is worthy of careful examination. In this dicta, the *Hilt* Court cited the early Wisconsin case of *Doemel v Jantz*, 180 Wis 225, 193 NW 393 (1923), as holding that “the public has no right of passage over dry land between low and high water mark but the exclusive use is in the riparian owner” (252 Mich 226). The dicta appears in the Court's discussion of the common law right to accretions, in which it surveys, but never proclaims to adopt, rulings from numerous federal and state courts (252 Mich 225-226).

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<sup>14</sup> The *Schaub* case holds that, under limited circumstances not applicable here, there is an exception to the rule that dicta is not to be used as precedent.

In *Doemel*, the Wisconsin Supreme Court held that a riparian owner on Lake Winnebago had exclusive rights of possession in dry areas between high and low water mark when they are periodically exposed each year. But Lake Winnebago is an inland lake, and Michigan law has distinguished between riparian rights on inland lakes and those on the Great Lakes from the start. *Doemel* is thus inapposite.<sup>15</sup>

Consistent with the state of affairs in Wisconsin under *Doemel*, the Michigan Legislature has enacted legislation granting riparian owners on inland lakes and streams exclusive possession of periodically exposed dry land between high and low water marks. In Part 301 of Michigan's Natural Resources and Environmental Protection Act ("NREPA"), entitled "Inland Lakes and Streams" (MCL 324.30101 *et seq*), Section 30111 (MCL 324.30111) provides:

This part does not deprive a riparian owner of rights associated with his or her ownership of water frontage. A riparian owner among other rights controls any temporarily or periodically exposed bottomland to the water's edge, wherever it may be at any time, and holds the land secure against trespass in the same manner as his or her upland subject to the public trust to the ordinary high-water mark.

This rule of exclusive riparian possession applies only to our state's inland lakes and streams. It is conspicuously absent from the companion statute applying to the Great Lakes, found in Part 325 of NREPA, the Great Lakes Submerged Lands Act, MCL §§ 324.32501 *et seq* (Appendix pp 71a-81a).

Thus, the reference in *Hilt* to the *Doemel* inland lake rule is not only mere dicta, it has no application to the shores of the Great Lakes. Plaintiff is unaware of any reported decision in Michigan or any other Great Lakes state applying the *Doemel* inland lake rule to the shores of the Great Lakes. Notwithstanding, the Court of Appeals decision states at p. 7 (Appendix p 16a) that:

Courts since then have recognized that under *Hilt*, a riparian owner has exclusive use of the dry land to the waters' edge, and loses the exclusive right to use that same dry land when it becomes submerged by the rising waters. See, e.g., *Peterman v Dept of Natural Resources*, 446 Mich 177, 192-193; 521 NW2d 499 (1994) (quoting *Hilt* the Supreme Court stated that it "has long been held" that the right to acquisitions to land, through accession or reliction, is itself one of the riparian rights . . . .

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<sup>15</sup> Unlike Michigan where the state holds title to the beds and shores of the Great Lakes while riparian owners hold such title on inland lakes, the general rule in Wisconsin is that the state holds title to the beds of all navigable waters, including inland lakes. *Doemel*, 180 Wis 395-398; *State v Trudeau*, 139 Wis2d 91, 101-102; 408 NW2d (1987). This general rule is apparently what the Court in *Hilt* had in mind in mentioning that the inland lake in *Doemel* was governed by the "Great Lakes rule of state ownership." 252 Mich 220.

The first problem with this analysis is that the dry land in *Hilt* was permanently relicted and accreted upland above the high water mark of Lake Michigan, while the rule of exclusive possession from *Doemel* applies only to inland lakes. The second problem is that the only authority cited by the Court of Appeals for the proposition that courts have recognized under *Hilt* that “a riparian owner has exclusive use of the dry land to the waters’ edge” is a passage from *Peterman v Dept of Natural Resources* which instead recognizes the actual ruling of *Hilt*, that a riparian owner enjoys exclusive use of dry, permanently relicted land.

In *Peterman*, the Michigan Department of Natural Resources had negligently constructed “unscientific” jetties next to the plaintiffs’ riparian property on Grand Traverse Bay, causing erosion of plaintiffs’ sandy beach to the extent it disappeared within a year, with substantial portions of their fast land above high water mark being swept away. 446 Mich 181. The Court held that damages caused to riparian property by governmental actions in improving navigation are generally compensable as a taking only with respect to fast land, but an exception exists, allowing recovery of damages to the beach below the high water mark, where the taking constitutes unnecessary injury to riparian rights caused by the government’s “unscientific” construction of jetties which could have been constructed without entirely destroying the plaintiff’s property. 446 Mich 201-202.

*Peterman* thus neither addressed nor disturbed the long-settled rights of riparian owners. Instead, as part of its analysis of the taking issue before it, the Court merely reviewed the rights of riparian owners, including the right to accretions and relictions which the *Hilt* decision enunciated. *Peterman*, 446 Mich 192-193. In the same review, the Court in *Peterman* also cites but does not adopt the *Doemel* dicta from *Hilt* (*Peterman*, 446 Mich 192). This citation is itself mere dicta in *Peterson*, having no bearing on the taking issue before the Court. Inexplicably, the Court in *Peterson* also cites MCL § 281.952(h), part of the Inland Lakes and Streams Act, for its definition of “ordinary high water mark” – instead of citing MCL § 324.32502, part of the Great Lakes Submerged Lands Act which specifically sets the ordinary high water mark for Lake Michigan.

Although the Court of Appeals, at p. 8 of its decision (Appendix p 17a), cites a string of Michigan cases following or referring to the holding in *Hilt* that the riparian owner’s title does not end at the meander line but rather extends to the water’s edge, none even come close to ruling that

the riparian owner possesses the shores of the Great Lakes to the exclusion of the public. As the Court in *Hilt* repeatedly emphasized, its decision left Michigan law squarely planted on the common law of the sea. It is unfathomable that the Court in *Hilt*, which exhaustively analyzed legal authorities and policy concerns in ruling on the reliction issue before it, would have enunciated a new rule of law intruding so extensively upon the state's domain as trustee of the Great Lakes shores, and eliminating public use of these sovereign shores, without any analysis at all.

In sum, a casual reading of *Hilt*, without a solid grasp of the common law of the sea as developed over the centuries before the decision or an understanding of its key nomenclature, led the Court of Appeals to a ruling which radically departs from the long-settled public trust doctrine adopted by the Michigan Supreme Court based on common law dating back more than half a millennium. In so ruling, the decision impermissibly abdicates the state's trustee obligation under that doctrine.

The Court of Appeals is not alone in its confusion over *Hilt*. The Court in *People v Broedell*, 365 Mich 201; 112 NW2d 517 (1961), faced with the question of whether a riparian owner's rights on the shore of Lake St. Clair extended to the high or low water mark, expressed confusion over the question of how far the State's trust extended:

Questions [have arisen] as to whether the trust ownership of the State should be held to extend to the all-time high water mark on record, the mean high water mark, the mean level, the mean low level or the lowest water mark. In holding to the theory that the State holds certain submerged lands in trust for public navigation, fishing, hunting, etc., this Court has referred to the low water mark as the boundary thereof. See *Lincoln v Davis*, 53 Mich 375, 19 N 103. See, also, *LaPorte v Menacon*, 220 Mich 684, 190 NW 655, for the low water mark theory. For language seemingly favorable to the high water mark theory, however, see *State v Venice of America Land Co*, 160 Mich 680, 125 NW 770; *Collins v Gerhardt*, 237 Mich 38, 211 NW 115. Plaintiff [the state] says that in administering the submerged land acts, above mentioned, it follows the 'philosophy' which it says is found in *Hilt v Weber* . . . of 'a moveable freehold', that is to say, that the dividing line between the State's and the riparian owner's land follows the water's edge or shore line at whatever level it may happen to be from time to time.

365 Mich 205-206. Of the cases cited, only *Lincoln v Davis* and *State v Venice of America Land Co* applied the public trust doctrine to the Great Lakes, while *Lincoln v Davis* never decided any issue of boundary. The Court in *Broedell* did not resolve its confusion, instead holding that decision in the case was controlled by another issue and remanding the case to the trial court.

A year later, in *McKnight v Broedell*, 212 F Supp 45 (ED MI 1962), the U. S. District Court for the Eastern District of Michigan ruled in a diversity action that the title to the same lots at issue in *People v Broedell* was unmarketable by virtue of the State's claim that the land was filled-in bottomland lying lakeward of the ordinary high water mark. In so ruling, the court re-affirmed the "established law" that upon admission to the Union each state acquired title from the United States to all land under navigable water up to the high water mark. *McKnight*, 212 F Supp 49.

**C. Plaintiff, like other members of the public, has the right to walk the shore of Lake Huron up to the ordinary high water mark as that line is defined under the common law of the sea.**

As unfaithful as the Court of Appeals decision is to the public trust doctrine, it is equally unfaithful to the physical reality of the stretches of fine sand beaches which define the Lake Huron shore at issue. In the discussion bridging pages 8 and 9 of its decision (Appendix pp 17a-18a), the Court of Appeals in essence grants private riparian owners exclusive use of the shore to the extent it is not covered by water from moment to moment. The Court of Appeals thus placed the dividing line between private and public uses on the shifting sands of the shore below high water mark, where the public has the right to walk inside the edge of a large wave as it reaches its limit on shore, but loses that right as the wave recedes to expose the wet sand the next moment. To avoid trespassing on private rights under high wave conditions, while maintaining any semblance of a straight course, a member of the public attempting to obey the Court of Appeals' new rule must thus walk in the churning waters and sand, rather than on the natural highway defined by the exposed wet sands of the shore.

In stark contrast, the common law of the sea long ago adopted by this Court defines the high water mark as the line marking the upper edge of this natural highway, and sets it as the boundary where the exclusive rights of the riparian owner end and trust lands begin. In *Borax v City of Los Angeles*, 296 US 10, 22- 25 (1935), the United States Supreme Court reviewed the common law basis for determining the ordinary high water, noting that the tidelands below the ordinary high water mark were those regularly subjected to the forces of the tides of the sea, "which is for the most part not dry or maniorable." 296 US 23.

The federal district court for the Eastern District of Michigan held in *McKnight v Broedell*, 212 F Supp 45, 50-51 (ED MI 1962), that the common law “ordinary high water mark” enunciated in *Borax* applies to Michigan’s Great Lakes shores. Although the court did not elaborate beyond the *Borax* holding, it did so later in *Miller v United States*, 480 F Supp 612, 619 (ED MI 1979), when it defined the common law ordinary high water mark on the shore of Lake Huron as follows:

The [ordinary high water mark] line on the shore [is] established by the fluctuations of water and indicated by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation . . . or other appropriate means that consider the characteristics of surrounding areas.

To like effect is the definition found in 78 Am Jur 2d Waters § 293 (2004):

The line of ordinary high water is defined as the line to which the water rises in the seasons of ordinary high water, or the line at which the presence of water is continued for such length of time as to mark upon the soil and vegetation a distinct character.

Although not subject to the more regular tides of the oceans, the waters of the Great Lakes are subject to persistent fluctuations which just as clearly establish a line on the shore. *Living with the Lakes*, US Army Corps of Engineers & Great Lakes Commission (2000), pp. 14-18, 30-31 (available on-line at <http://www.glc.org/living>). Storm surges on the Great Lakes cause dramatic water fluctuations which can last from several hours to several days. *Id.* at 15. Pendulum-like water movements called seiches, which occur when wind and barometric conditions change rapidly, cause water levels to rise on one side of the lake and drop at the opposite side in oscillating, pendulum-like movements which can also continue for days. *Id.* In the meantime, water levels of the Great Lakes exhibit seasonal and more long-term fluctuations due primarily to differences in the amount of precipitation and ice-melt the lakes receive from year to year and other natural factors. *Id.* at pp 16-18. Together these sudden and more long-term water fluctuations establish a natural line on the shores below which the land is barren, and too persistently wet or damp to be suitable for human occupation or the growth of vegetation. *Id.* at 14-18, 30-31.

Considering the varying hydrogeological characteristics below ordinary high water mark along the diverse shores of the Great Lakes, from the wetlands along Saginaw Bay to the bluffs along the shoreline of Lake Michigan and the rocky cliffs on the shores of Lake Superior, there are little or no trust lands available for the public to walk upon from place to place, and from time to time.

However, where such land does exist below the ordinary high water mark, it defines a natural highway particularly well suited for walking on, but useful for little else. *Id.*

By adopting the common-law ordinary high water mark as the line marking the limits for public passage by foot, instead of confining the public to walking in the waters themselves, this Court would thus remain faithful not only to the strong commands of the public trust doctrine but also to the laws of nature. It would also permit plaintiff and other people in Alcona County to walk where they have been walking for many years – on the barren stretch of hard-packed sand defining a natural highway above the edge of the moving waters, instead of in the often frigid waters below.

This Court should take judicial notice that in the 21<sup>st</sup> Century the Great Lakes are frequented not only by beach walkers and swimmers, but also by small and vulnerable recreational watercraft which hug the shores, including canoes, kayaks, and windsurfers. Sudden or persistent large waves, undercurrents, riptides, and winds, all common to Great Lakes waters, often make use of the shores indispensable. To deny the people their navigational and recreational use of the sovereign shores of the Great Lakes as the Court of Appeals has done here – to place these vast, beautiful stretches of natural highways in the exclusive possession of private parties, at the expense of the safety and welfare of the public – is to impermissibly abdicate the state’s solemn trustee obligation under a doctrine embedded deeply in the jurisprudence of our state and nation. *Illinois Central; Venice of America Land Co; Obrecht, supra.*

This Honorable Court should reverse the Court of Appeals decision as a radical departure from the long-standing public trust doctrine governing Michigan’s Great Lakes shores, and should rule that plaintiff has a right, as a member of the public, to walk the sovereign shore of Lake Huron below the ordinary high water mark.

**Issue II. The Court of Appeals decision should be reversed because it defies the purpose of the Great Lakes Submerged Lands Act, enacted by the Michigan Legislature to preserve and protect the public trust in the beds and shores of the Great Lakes up to the ordinary high water mark, and inherently embracing the public right to passage by foot over Great Lakes shores.**

### **1. Standard of Review**

De novo appellate review applies to this issue on two grounds. First, the issue concerns

construction of a statute. Statutory construction determinations are always reviewed de novo on appeal. *Taggart v Tiska*, 465 Mich 665, 669-670; 645 NW2d 240 (2002). Second, the appeal arises from summary disposition in favor of plaintiff. Summary disposition rulings are reviewed de novo. *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 497; 635 NW2d 396 (2002)

## **2. Analysis**

The strong public trust policy of our State is expressed in the sweeping terms of Michigan's Constitution of 1963, art 4, § 52:

The conservation and development of the natural resources of the State are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The Legislature shall provide for the protection of the air, water and other resources of the State from pollution, impairment and destruction.

This section of the constitution recognizes the importance of the public trust doctrine as reflected in decisions of this Court including *Venice of America Land Co, supra*. See *People v Babcock*, 38 Mich App 336, 350-351; 196 NW2d 489 (1972). The second sentence, by use of the word "shall", creates a mandatory legislative duty to act to protect Michigan's natural resources, and was viewed that way by a majority of the Constitutional Convention. *Highway US-24 v Vanderkloot*, 392 Mich 159, 179-182; 220 NW2d 416 (1974).

This solemn duty of the Michigan Legislature to protect the paramount public trust interests mirrors the ruling in *Illinois Central* that each state legislature must exercise the power of the state in executing the public trust in the shores and beds of the Great Lakes. The legislature's exercise of this power and solemn duty is reflected in the GLSLA, MCL §§ 324.32501 *et seq* (Appendix pp 71a-81a), and particularly MCL § 324.32502:

The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those

agreements for use, sales, lease, or other disposition. The word “land” or “lands” as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying below and lakewards of the natural ordinary high-water mark, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

Appendix p 72a, emphasis added. In unambiguous terms, the statute declares its purpose to preserve and protect the public’s right to use the sovereign trust lands of the Great Lakes lying below the ordinary high-water mark for “hunting, fishing, swimming, pleasure boating, or navigation.” Either as an indispensable incident of these declared public uses, or as a reasonable reading of the statute to protect real-world public recreational needs, the statute clearly embraces the public right of passage by foot over Great Lakes shores.

In the plain words of MCL § 324.32502, the public trust provisions of the GLSLA do not apply to “rights acquired by accretions occurring through natural means or reliction”, thus codifying the common law of the sea rule of accretion and reliction articulated in this Court decisions in *People v Warner*, 116 Mich 228; 74 NW 705 (1898), *Nedtweg v Wallace*, 237 Mich 14; 208 NW 51 (1926), and *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930).

The Court of Appeals decision guts the purpose of MCL § 324.32502 by holding that it “merely sets forth the rules for construing the different sections within part 325, and that it provides no substantive rights.” Decision p 10, Appendix p 19a. As held by the Court in *Obrecht v National Gypsum Co*, 361 Mich 399, 416; 105 NW2d 143 (1960), in the plain words of the statute “the legislature bids us construe its design and purpose ‘so as to preserve and protect the interests of the general public in such submerged lands’.”

The Court of Appeals noted in its decision that MCL § 324.32502 is silent as to the public’s use of the shores for walking. However, when the GLSLA is read *in pari materia* with its companion act in NREPA, the Inland Lakes and Streams Act (“ISLA”), MCL 324.30101 *et seq*, a more telling silence emerges. The ISLA grants riparian owners on inland lakes and streams the right of exclusive possession of any temporarily or periodically exposed bottomland below the high water

mark (MCL § 324.30111), while any such provision is conspicuously absent from the GLSLA.

The GLSLA finds early roots in 1913 PA 326 (Appendix pp 82a-90a), enacted shortly after the Michigan Supreme Court's seminal decisions in *St. Clair Fishing & Shooting* and *Venice of America Land Co.* The 1913 Act authorized the leasing of certain unpatented submerged Great Lakes bottom lands belonging to the state or held in trust by it (1913 PA 326, § 1, Appendix pp 82a-83a), with the rights of lessees being "subject to the paramount right of navigation, hunting and fishing, which rights are to remain in the general public and in the government as now existing and recognized by law" (1913 PA 326, § 12, Appendix p 85a). The 1913 Act, like its successor statute enacted in 1955 as the Great Lakes Submerged Lands Act (1955 PA 247, Appendix pp 91a-93a), recognized the validity of the principle that "a state, when admitted into the Union, becomes entitled to land under navigable water below the high-water mark, and within its limits which has not been previously granted." *McKnight v Broedell*, 212 F Supp 45, 49 (1962).<sup>16</sup>

The public uses protected in the GLSLA as originally enacted in 1955 were limited to "hunting, fishing or navigation" (MCL § 322.702, Appendix p 91a-92a), but in 1958 were expanded to include "swimming" and "pleasure boating." (1958 PA 94, Appendix pp 94a-97a; MCL § 322.702, Appendix pp 94a-95a). The statute was amended again in 1968 (1968 PA 57, Appendix 98a) to clarify that the Great Lakes "lands" embraced by the Act include all those "lying below and lakeward of the natural ordinary high-water mark", specifically defined for each lake in terms of International Great Lakes Datum (IGLD), as in the present version of the statute (MCL § 324.32502, Appendix p 72a).

Expansion of the GLSLA in 1958 to encompass swimming and pleasure boating as protected public uses finds a common law corollary in this Court's decision in *Bott v Mich Dept of Natural Resources*, 415 Mich 45, 109; 327 NW2d 838 (1982), holding that the reach of the public trust doctrine must evolve to protect the ever-evolving needs and uses of the public, including its current need for recreational uses, under this Court's "duty to insure that the law reflects the needs and

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<sup>16</sup> The GLSLA (1955 PA 247) was enacted by the Michigan Legislature just two years after the federal Submerged Lands Act of 1953, 43 USC 1301-1315, "by which the United States relinquished to the coastal States its remaining rights, if any, in all lands lying beneath navigable waters within state boundaries." *Obrecht, supra*, at 407.

values of the society it is designed to serve.” See also *Collins v Gerhardt*, 237 Mich 38, 42; 211 NW 115 (1926) (the common law applying to navigable waters is sufficiently flexible to adapt itself to the changing needs of the public).

As a whole, the various sections of the GLSLA establish a comprehensive scheme of regulatory control by the Michigan Department of Environmental Quality (“MDEQ”) of the waters, beds, and shores (“bottomlands”) of the Great Lakes, to be exercised such that it “will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired.” MCL § 324.32502, Appendix p 72a. Under this regulatory scheme: (1) submerged lands may be filled-in and bottom lands leased or deeded by the State only under prescribed conditions (MCL 324.32503, Appendix p 73a); (2) a person who “excavates or fills or in any manner alters or modifies” any lands or waters of the Great Lakes without the approval of MDEQ is guilty of a misdemeanor (MCL 324.32510, Appendix p 76a); and (3) only certain prescribed beach maintenance activities are allowed, for a limited time, without a permit (MCL 324.32512, Appendix pp 76a-77a).<sup>17</sup>

MDEQ has exercised its authority under MCL § 324.32509 to promulgate rules necessary to implement the GLSLA by way of the Great Lakes Submerged Lands Regulations, 1979 AC, R 322.1001 *et seq.* Under these regulations, permits are required to place docks, piers, and boat hoists on Great Lakes shores (1986 MR 4, R 322.1013), and to dredge, fill, or place materials on the shores (1979 AACS 12, R 322.1008). All such permits are subject to conditions which MDEQ considers necessary to protect the public trust (1986 MR 4, R 322.1011).

The state’s trustee ownership and regulatory control of Great Lakes lands up to the high water mark as set out in the GLSLA echoes this Court’s decisions dating back a century ago. In this light, the argument advanced by the amici organizations, that Great Lakes riparian owners somehow have a reasonable expectation of exclusive possession and control of the State’s sovereign lands below high water mark, rings excruciatingly hollow. To borrow the words of the Wisconsin Supreme

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<sup>17</sup> The limited beach maintenance activities as now permitted under the GLSLA were added by amendment in 2003 (2003 PA 14, 2003 PA 163) at the urging of Great Lakes riparian owners headed by Save Our Shoreline (SOS). See SOS web site at [www.saveourshoreline.org](http://www.saveourshoreline.org).

Court, the lands below the ordinary high water mark on Michigan's 3,288 miles of Great Lakes shores have been "encumbered by the public trust doctrine and heavily regulated from the get-go." *R W Docks & Slips v State*, 244 Wis2d 497, 516; 628 NW2d 781 (2001).<sup>18</sup>

By the unambiguous terms of the GLSLA, the state's title in trust for the people encompasses all Great Lakes lands lying below the "ordinary high water mark" as defined in terms of International Great Lakes Datum 1955 (MCL § 324.32301) The IGLD elevations are official measurements of mean Great Lakes water levels collected from water level gages throughout the Great Lakes, to which the governments of both the United States and Canada subscribe. *Living with the Lakes*, *supra*, at p 27. Due to a number of variables which change over time, the IGLD is updated every 25 to 30 years. *Id.* at 17, 27. <sup>19</sup>

Although the GLSLA protects the trust lands of the shores up to the high water mark based on IGLD 1955, its silence as to what extent travel by foot is permitted leaves the issue open to interpretation by this Court. However, the broad sweep of the navigational and recreational public uses protected under the GLSLA, and the command of MCL § 324.32502 that its design and purpose be construed "to preserve and protect the interests of the general public" clearly encompasses the public's right to passage by foot along the shores.

**A. As in Michigan, under the laws of the other seven Great Lakes States, the reach of the public trust doctrine inherently embraces the public's right to walk the shores.**

Like Michigan, under the rulings in *Illinois Central* and *Shively*, the other seven Great Lakes States also took title to the lands and waters of the Great Lakes up to the high water mark on an equal footing upon their admission into the Union, all subject to the same common law of the sea. To the extent that the huge bodies of fresh water making up the Great Lakes have unique hydrogeological characteristics and social value of their own, the jurisprudence of the other Great Lakes States –

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<sup>18</sup> Defendant Mr. Goeckel, who admitted in his deposition that the state owns the shore above the water's edge, obviously does not share the unreasonable expectations of riparian property owners alluded to by amici.

<sup>19</sup> The IGLD of 1955 was updated 30 years later to IGLD 1985, although MCL 324.32502 has not been so updated.

Minnesota, Wisconsin, Illinois, Indiana, Ohio, Pennsylvania, and New York – is especially relevant.

Current laws governing the area between the high and low water marks in the Great Lakes states amount to a complex and oftentimes arcane body of law. But one thing can be said. Nowhere in the laws of the Great Lakes states does there exist a rule of law granting the riparian owner use and possession of the shores of the Great Lakes to the exclusion of the public, as the Court of Appeals has ruled here.

The extent of development of the relevant case law in each Great Lakes state is almost directly proportional to the number of miles of Great Lakes shoreline lying within its borders. The following is a list of total miles of Great Lakes shoreline from a table published by MDEQ entitled “Great Lakes Shorelines” (available on-line at [www.michigan.gov/deq](http://www.michigan.gov/deq)):

| <u>State</u> | <u>Great Lakes Shoreline Miles</u> |
|--------------|------------------------------------|
| Michigan     | 3,288                              |
| Wisconsin    | 820                                |
| New York     | 473                                |
| Ohio         | 312                                |
| Minnesota    | 189                                |
| Illinois     | 63                                 |
| Pennsylvania | 51                                 |
| Indiana      | 45                                 |

**1. Wisconsin:** Of the Great Lakes states, the law of Wisconsin is the most relevant to Michigan by virtue of Wisconsin’s common roots as part of the Northwest Territory, its geographic proximity, and its 820 miles of Great Lakes shoreline, ranking second in number only to Michigan’s 3,288 miles. The Supreme Court of Wisconsin has guarded the public’s rights to use the shores of Lake Michigan and Lake Superior as “an encumbrance on riparian rights [which] is established ‘by judicial authority so long acquiesced in as to become a rule of property.’” *R W Docks & Slips v State*, 244 Wis2d 497, 512; 628 NW2d 781 (2001), citations omitted. The public trust doctrine, which originated in the Northwest Ordinance of 1787, “is part of the organic law of the state . . . to be broadly and beneficially construed.” *RW Docks*, at 509, 512).

In Wisconsin, title to the waters and shores of the Great Lakes, up to the line of ordinary high-water mark, is in the state in trust “so as to preserve to the people forever the enjoyment of the waters of such lakes . . . to the same extent that the public are entitled to enjoy tidal waters at the common law.” *Illinois Steel Co v Bilot*, 109 Wis 418, 84 NW 855, 856 (1901), quoted with approval in *State v Trudeau*, 139 Wis2d 91, 101; 408 NW2d 337 (1987), *cert denied*, 484 US 1007 (1988) (emphasis added); *R W Docks*, at 509; *C Beck Co v Milwaukee*, 139 Wis 340, 120 NW 293, 296 (1909). Wisconsin has adopted the common law definition of the high water mark, i.e., the line “up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.” *State v Trudeau*, 139 Wis2d 102. Public uses protected under the public trust doctrine include “purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty.” *R W Docks*, at 510.

The Wisconsin Supreme Court has consistently held that the rights of riparian owners are qualified and subordinate to the paramount rights of the public, and are limited to reasonable access and use only, as measured by the capacity of the lake and the uses to which it has been put. *R W Docks*, at 511. A review of Wisconsin case law yields no case coming even close to granting a riparian owner on the Great Lakes an exclusive right of possession to the shores below the high water mark.<sup>20</sup>

The 2001 decision in *R W Docks* reflects the Wisconsin Supreme Court’s trend of applying the public trust doctrine with ever-increasing vigor. The plaintiff in *R W Docks & Slips* sought over \$1 million in damages, alleging a taking of its property arising from the Wisconsin DNR’s denial of a dredging permit in the last stage of development of a private marina along the shore of Lake Superior. The Court ruled that there was no compensable taking because “to the extent that a private property interest is implicated it is riparian only and therefore qualified in nature, encumbered by the public trust doctrine.” 244 Wis2d 515. The Court was “strongly influenced by the fact that the

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<sup>20</sup> Nor is there any Wisconsin case applying the inland-lake ruling in *Doemel v Jantz*, 180 Wis 225; 193 NW 393 (1923), to the shores of the Great Lakes. See the discussion *infra* of the Hilt Court’s reference to *Doemel*’s inland lake rule in dicta.

development of this private marina on the bed and waters of Lake Superior was encumbered by the public trust doctrine and heavily regulated from the get-go.” 244 Wis2d 515-516.

2. **Ohio:** Like the Wisconsin Supreme Court, the Ohio Supreme Court has vigilantly protected the public’s rights to the waters and lands of the 312 miles of Lake Erie bordering Ohio. In 1916 the Court ruled that title to the bottomland of Lake Erie within the State of Ohio is in the state as trustee for the benefit of the people. *State v Cleveland & Pittsburgh RR Co*, 94 Ohio St 61, 77; 113 NE 677 (1916). The riparian’s rights must yield to the paramount right of the state as trustee of the public’s rights, and the state cannot abandon the trust property by acquiescence or permit use of it for private ends different from the trust’s objects. 94 Ohio St 79-80.

Several decades later the Ohio Supreme Court held, on the basis of an Ohio statute first enacted in 1917, that the title of riparian owners of the upland extends to the “natural shoreline” of Lake Erie. *State v Cleveland*, 150 Ohio St 303, 337; 82 NE2d 709 (1948). Although the Court has not specifically defined the “natural shoreline” of Lake Erie, the Ohio Department of Natural Resources equates the natural shoreline with the ordinary high water mark as measured by International Great Lakes Datum (IGLD) 1985, because it “coincides very well with the physical evidence of what is sometimes referred to as the [ordinary high water] mark.” *Beach Cliff Board of Trustees v Ferchill* (Ohio App 8 Dist, 2003 OH 2300; 2003 WL 21027604), *leave to appeal denied*, 100 Ohio St3d 1485; 798 NE2d 1093 (2003).

Similar to the Wisconsin courts, the Ohio courts have held that the public trust doctrine encompasses “all legitimate uses, be they commercial, transportation, or recreational.” *State v Newport Concrete Co*, 44 Ohio App2d 121; 336 NE2d 453, 457-58 (1975).

3. **Minnesota:** In Minnesota, the title of riparian owners along the state’s 189 miles of Lake Superior shoreline extend to the low water mark. *State v Korner*, 127 Minn 60, 148 NW 617, 621 (1914); *State v Slotness*, 289 Minn 485, 486; 185 NW2d 530 (1971). However, the riparian owner’s title is absolute only above the ordinary high water mark, being qualified by the public’s right to use the area between high and low water marks “for purpose of navigation or other public purpose.” *Korner*, at 623. The Court has adopted the common law definition of the ordinary high

water mark, *Carpenter v Board of Com'rs of Hennepin Cty*, 56 Minn 513, 522; 58 NW 295 (1894). The Court has also taken an expansive view of the public trust doctrine, holding in *Lamprey v Metcalf*, 52 Minn 181, 199-200; 53 NW 1139 (1893), that it protects the rights of the people to all beneficial public uses existing now or in the future, and more recently in *Slotness, supra*, that protected public uses on Lake Michigan include recreational activity. 289 Minn 486.

**4. Illinois:** The only Great Lakes shoreline lying within the State of Illinois is 63 miles of relatively congested Lake Michigan waterfront in the area of Chicago. The Supreme Court of Illinois, in the early case of *Seaman v Smith*, 24 Ill 521; 14 Peck 521 (1860), held that the boundary of land in a deed calling for Lake Michigan as a line is “the line at which the water usually stands, when free from disturbing causes.” The Court defined this line as “that place where its [the Lake’s] outer edge is usually found, and “not...the highest point on the shore to which it had ever attained, or the lowest to which it had receded.” This rule was followed and re-affirmed in *Brundage v Knox*, 279 Ill 450, 470-71; 117 NE 123 (1917).<sup>21</sup>

More recently, in *People v Chicago Park District*, 66 Ill2d 65, 80-81; 360 NE2d 773 (1977), the Illinois Supreme quoted with approval from *Borough of Neptune City v Borough of Avon-By-The-Sea*, 61 NJ 296, 309; 294 A2d 47 (1972), to the effect that uses permitted under the public trust doctrine embrace “recreational uses, including bathing, swimming and other shore activities”, and that “The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.” 66 Ill2d at 78.

**5. Indiana:** Indiana judicial decisions covering riparian rights in the shores of the State’s 45 miles of Lake Michigan shoreline are virtually nonexistent, although the Indiana Supreme Court articulated its adherence to the public trust doctrine in an early case involving the Ohio River,

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<sup>21</sup> The Court stated the boundary differently in *Revell v People*, 177 Ill 468, 483-86; 52 NE 1052 (1898), which has never been overruled, holding that the common law of the sea applies to Lake Michigan so that the State’s title in trust for the public extends to high water mark, with riparian owners having “not a title in the soil below high-water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway.” 177 Ill 485.

*Sherlock v Bainbridge*, 41 Ind 35, 13 AmRep 302 (1872). In *Lake Sand Co v State*, 68 Ind App 439, 120 NE 714, 716 (1918), the court held that the public trust doctrine extends to the waters and lands of Lake Michigan, citing with approval cases holding that the public trust extends to high water mark. See also *State ex rel Indiana Dept of Conservation v Kivett*, 228 Ind 623, 95 NE2d 145 (1950), (originating with the Northwest Ordinance, the public trust doctrine embraces waters which were navigable when Indiana became a state in 1816). Like the Ohio DNR, the Indiana Natural Resources Commission has by rule adopted the IGLD high water mark as the line of demarcation for navigable waterways (312 IAC 6-1-1(b), defined for Lake Michigan as 581.5 feet IGLD 1985 (312 IAC 1-1-26(2))), the same elevation used by the U.S. Army Corps of Engineers.

**6. New York:** Decisions of the New York courts addressing the public's rights in the shores have focused on the state's Atlantic coast, which only a few cases addressing the shores of Lakes Ontario and Erie. In *Smith v City of Rochester*, 92 NY 463 (1883), the New York Court of Appeals distinguished between the common law rules applying to small inland lakes and those applying to "vast fresh-water lakes or inland seas of this country or the streams forming the boundary line of States" (92 NY 479). The common law rule for "inland seas" places the boundary of riparian owners at the line of the high water mark (92 NY 486). Later, the Court in *People v Burnham*, 112 NY 597, 606; 20 NE 577 (1889), cited the *Smith* decision in ruling that title to the waters and shores of the Great Lakes is in the state in trust for the public, up to the line of the ordinary high-water mark. Then, in *Stewart v Turney*, 237 NY 117; 142 NE 437 (1923), the Court ruled that riparian owners on a small inland lake held title to the low-water mark, and a later lower court decision misapplied this inland-lake rule to property on the shore of Lake Ontario. *Ransom v Shaeffer*, 274 NYS 570, 153 Misc 199 (1934).

While no New York case has ruled on the rights of the public in the shores of the Great Lakes, New York case law governing the state's Atlantic coast is well-developed. New York is one of a strong majority of states on the ocean coasts, by one estimate approximately three-fourths, which have held that wet-sand beaches are publicly owned. See D. J. Brower et al, *Access to the Nation's Beaches: Legal and Planning Perspectives*, Sea Grant Publication UNC-SG-77-18 (1978), p. 4

(available on-line at <http://nsgl.gso.uri.edu/ncu/ncub78001.pdf>).

New York case law applying to the shores of the Atlantic Ocean unequivocally holds that the public has the right to travel by foot between the high and low water marks. The shore below the high water mark is subject “to the right of the public of access to the water for fishing, bathing, boating and other lawful purposes, to which the right of access over the beach may be a necessary incident.” *Tucci v Salzhauer*, 336 NYS2d 712, 713; 40 AD2d 712 (1972) The public’s right of access includes the right of passing and re-passing as a necessary incident of fishing, bathing and boating. *Id.*; *Barnes v Midland R Terminal Co*, 193 NY 378, 384; 85 NE 1093 (1908); *People v Brennan*, 255 NYS 331, 333; 142 Misc 225 (1931).

**7. Pennsylvania:** There are only 51 miles of Lake Erie shoreline in Pennsylvania, and a dearth of judicial decisions concerning it. However, in the early case of *Freeland v Pennsylvania RR Co*, 197 Pa 529, 539; 47 A 745 (1901), the Pennsylvania Supreme Court held that a riparian owner on a navigable river owns the soil to the ordinary low-water mark, subject to the public right of passage between the ordinary high and low water marks. In *Sprague v Nelson*, 6 Pa D&C 493, 496; 6 Erie CLJ 181 (1924), the court applied the *Freeland* rule to the shores of Lake Erie, holding that shore owners take title to the low water mark, subject to the public right of navigation to the high water mark. The policy of the Pennsylvania Department of Environmental Protection (“PDEP”) is that “there is a public easement along the shoreline of Lake Erie between the ordinary high and low waters marks . . . . for lateral movement along the shoreline and open for certain prescribed activities some of which are (but not limited to) fishing, fowling and navigation.” See Malone, Shamus, “PA Public Access Policy” (PDEP) (12/6/2000), Appendix p 99a.

In summary, the general rule which emerges from the laws of the other Great Lakes states is that, regardless of where the line separating the title of the riparian owner from the state is drawn, the reach of the public trust doctrine extends to the ordinary high water mark. Wisconsin and Minnesota have judicially defined the ordinary high water mark according to the common law rule, while Ohio and Indiana have adopted the IGLD elevations for Lake Erie and Lake Michigan by agency regulations.

While plaintiff is unaware of any reported decision specifically addressing the question before this Court, the reach of the public trust doctrine as established in the laws of all the Great Lakes states fundamentally embraces the right of the public to travel by foot on the shores below the ordinary high water mark. Public uses protected under the doctrine include this right as a necessary incident of the right to use and enjoy the waters themselves for both navigational and purely recreational purposes. Were this Court to permit the Court of Appeals decision to stand, Michigan would bear the dubious distinction of being the only state whose judiciary has confined the public to walking in the waters below the natural highways defined along Great Lakes shores. Moreover, such an outcome would defy the fundamental rule that the state cannot abdicate its trust over so vast an extent of sovereign lands – leaving 3,288 miles of renowned Great Lakes shores under the exclusive use and control of private parties while extinguishing the peoples’ long of them as natural highways. *Illinois Central; Shively; St Clair Fishing & Shooting Club; Venice of America Land Co; Obrecht, supra.*

**ISSUE III. At a bare minimum, the Court of Appeals decision should be vacated and the case remanded to the circuit court to: determine whether the elements of a private and/or public easement by prescription to walk the shore of Lake Huron are met; determine whether a public easement by custom exists; and for any necessary proceedings relating to defendant Mr. Goeckel’s binding statements, which on their face leave no real controversy remaining between the parties.**

As plaintiff claimed in her complaint, members of the public have walked the shore of Lake Huron in the area of the parties’ properties by long custom. Defendant Mr. Goeckel himself, and his predecessor in interest Ms. Kushmaul, both admitted that they have customarily walked the shore along with other members of the public. Thus, the public’s use of the Lake Huron shore in the area for passage by foot for at least some period of time is undisputed. R Goeckel deposition pp 19, 35 (Appendix pp 63a, 65a); A Kushmaul deposition pp 14-15 (Appendix pp 68a-69a).

Under Michigan case law, an easement by prescription is established from use of another’s property that is open, notorious, adverse and continuous for 15 years, requiring elements similar to adverse possession, except exclusivity. *Higgins Lake Property Owners Assoc v Gerrish Twp*, 255

Mich App 83, 118; 662 NW2d 387 (2003). Here, plaintiff may well be able to establish these elements if, at a bare minimum, the Court vacates the Court of Appeals decision and remands the case to the circuit court for further fact finding.

While the public may likewise acquire a prescriptive “public” easement, more is required. *Id.* at 119-120. In addition to recreational use of an area by members of the public over a period of 15 years, there must also be some governmental action in facilitating and controlling the public’s use. *Id.* at 119-120. The situation can be likened to establishing a road as a public road by user, which requires “acceptance by the public at least by taking over control and maintenance of some portion of such road.” *Id.*, quoting *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958).

To establish a public easement here would require further fact finding by the trial court inasmuch as, while the record shows use of the Lake Huron shore by plaintiff and her family for far longer than the 15-year period (Affidavit of J Glass, p 1 ¶ 5, p 2 ¶ 10, Appendix pp 48a-49a), the length of public use was never established. Otherwise, the elements of a public easement are clearly satisfied here.<sup>22</sup> As to the basic element of adverse use of another’s property, the public’s use of the shore for passage by foot is adverse to what the Court of Appeals has deemed to be the riparian owner’s property right of exclusive possession and control of the shore.

The required element of governmental control and maintenance of the shore is more than satisfied by MDEQ’s exercise of its regulatory control, delegated to it under the GLSLA, over the entire Lake Huron shore up to the ordinary highwater mark. By way of example only, MDEQ’s Great Lakes Submerged Lands Regulations, 1979 AC, R 322.1001 *et seq*, require that permits be obtained for placing docks, piers, and boat hoists on Great Lakes shores (1986 MR 4, R 322.1013), subject to conditions which MDEQ considers necessary to protect the public trust (1986 MR 4, R 322.1011).

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<sup>22</sup> For cases finding a public easement by prescription over privately-owned shore lands above the high water mark and upland beyond the vegetation line, see Mongeau, *Public beach access: An annotated bibliography*, 95 Law Library J 4 (2003), pp 516-517, 534-536 (available on-line at [www.aallnet.org/products/2003-40.pdf](http://www.aallnet.org/products/2003-40.pdf))

To the extent that all the elements of a private and/or public easement to walk the Lake Huron shore may well be satisfied here, the Court of Appeals decision confining plaintiff and other members of the public to walking in the water is offensive to the principles of equity underlying the doctrine of prescription. To avoid the injustice in depriving plaintiff and the public of walking the shore where they have done so by long custom, this Court should, at a bare minimum, remand to the circuit court for any necessary fact finding.

Similarly, the public's use of the Lake Huron shore for walking or strolling may, upon further fact finding, satisfy the elements of the English common law doctrine of custom, relied upon by the Supreme Court of Oregon in recognizing public rights in the dry sand area above the high water mark. *State ex rel Thornton v Hay*, 254 OR 584; 462 P2d 671 (1969). As noted in *Thornton*, the doctrine of custom can be applied to embrace a larger region than the doctrine of prescription, thus avoiding tract-by-tract litigation which could overwhelm the courts. *Id.* at 595. The seven elements of the doctrine require use of the land (1) dating back to antiquity; (2) without interruption; (3) peaceably; (4) appropriately with respect to the nature of the land and local usages; (5) where the boundary is certain; (6) where the custom is obligatory upon landowners; and (7) where the custom is not inconsistent with other customs or laws. *Id.* at 595-596.<sup>23</sup> Because the custom of the people in Alcona County of using the shore for passage by foot could well meet each element of the custom doctrine, the Court should, at a bare minimum, vacate the Court of Appeals decision and remand for further fact-finding by the circuit court.

Lastly, defendants should be held to be bound by defendant Mr. Goeckel's deposition testimony, which leaves no real controversy between the parties. Mr. Goeckel, unlike the unnamed riparian owners alluded to by the amici organizations, did not suffer any unreasonable expectation of exclusive possession of the shore abutting his riparian property. He testified in his deposition that he has no objection to anyone walking the shore above the water's edge, which he stated "is the State of Michigan's property" (R Goeckel deposition pp 17-19, 27, 35; Appendix pp 61a-65a). Clear,

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<sup>23</sup> For other cases applying the doctrine of custom to shore lands, see Mongeau, *supra* n 24, pp 516, 532-534.

intelligent statements of a party in deposition testimony “should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence.” *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972). In the absence of any explanation or modification of his position, defendant Mr. Goeckel’s deposition testimony is binding upon defendants, leaving no real controversy between the parties. On this basis alone, the Court should vacate or overrule the Court of Appeals decision and/or remand to the circuit court for any necessary further proceedings.

**A. The Court of Appeals decision also raises serious policy concerns.**

The Court of Appeals decision not only unsettles the long-standing public trust doctrine of this state, its impact on the state and its people also raises serious policy concerns. The obvious dire consequence of the Court of Appeals’ error is that it compels plaintiff and other members of the public to walk in the waters of the Great Lakes to avoid trespassing on private property rights. But the likely impact of the decision extends further.

There can be but little doubt that the sovereign waters, beds, and shores of the Great Lakes are the principal natural resource asset of the State of Michigan and its people. Any doubt is easily resolved by visiting the state’s official travel website at [www.travel.michigan.org](http://www.travel.michigan.org), where the opening screen invites visitors to “Come to Michigan, the Great Lakes playground.” Using the map of Michigan on the site to link to Oscoda, which is just south of Greenbush Township on the Sunrise Side, the website invites visitors to the Lake Huron shoreline where “miles of sandy beaches and breathtaking sunrises await you.” These descriptions highlight the important interests of the state and its people in these pristine shores, particularly the people in rural northeast Michigan who rely on tourism as a primary source of income.

In addition, if this Court reverses the Court of Appeals decision and affirms the public’s recreational rights in Great Lakes trust lands as encompassing the right of passage by foot, riparian owners themselves will have much to gain. Under the Court of Appeals decision, riparian owners like the defendants, who have habitually walked these sovereign shores, must now confine their

beach walking to the lakefront footage they own, or run the risk of trespassing on private rights.

### **CONCLUSION**

The Court of Appeals decision runs afoul of the fundamental principles of the public trust doctrine established by decisions of this Court extending back a full century. The decision is also repugnant to the Great Lakes Submerged Lands Act, which reflects the Michigan Legislature's exercise of its solemn duty to protect and preserve the public's interests in trust lands, a duty imposed upon it by the Michigan Constitution, and one which cannot be abdicated under the ruling in *Illinois Central*. The outcome of this case is of monumental consequence to the State of Michigan and its people, not just to plaintiff and her fellow members of the public in Greenbush Township. In the words of the International Joint Commission ("IJC") established by the United States and Canada, "What we do to the Great Lakes, we do to ourselves and to our children." IJC, *Seventh Biennial Report on Great Lakes Water Quality*, p 4 (1994) (available on-line at [www.ijc.org](http://www.ijc.org)). The outcome here carries that much weight.

### **RELIEF REQUESTED**

Plaintiff-Appellant Joan M. Glass respectfully asks this Court to: (1) reverse the decision of the Court of Appeals, and either re-instate the circuit court's ruling or modify it as the Court deems necessary, pursuant to MCR 7.316(A)(5); (2) alternatively, vacate or overrule the Court of appeals decision and remand to circuit court for any necessary further proceedings; and (3) grant such other relief as is proper and just. MCR 7.316(A).

Respectfully submitted,



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